



LEGAL COMMITTEE  
87th session  
Agenda item 17

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## REPORT OF THE LEGAL COMMITTEE ON THE WORK OF ITS EIGHTY-SEVENTH SESSION

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**A INTRODUCTION**

1 The Legal Committee held its eighty-seventh session at IMO Headquarters from 13 to 17 October 2003, under the chairmanship of Mr. A.H.E.Popp, QC (Canada).

2 The session was attended by delegations from the following Member States:

ALGERIA	LEBANON
ARGENTINA	LIBERIA
AUSTRALIA	LITHUANIA
BAHAMAS	MALTA
BELGIUM	MARSHALL ISLANDS
BRAZIL	MEXICO
BULGARIA	MOROCCO
CANADA	NAMIBIA
CHILE	NETHERLANDS
CHINA	NEW ZEALAND
COLOMBIA	NIGERIA
COTE D'IVOIRE	NORWAY
CUBA	PAKISTAN
CYPRUS	PANAMA
DEMOCRATIC PEOPLE'S	PERU
REPUBLIC OF KOREA	PHILIPPINES
DENMARK	POLAND
ECUADOR	PORTUGAL
EGYPT	REPUBLIC OF KOREA
ESTONIA	RUSSIAN FEDERATION
FINLAND	SAUDI ARABIA
FRANCE	SINGAPORE
GERMANY	SOUTH AFRICA
GHANA	SPAIN
GREECE	SWEDEN
GUATEMALA	SWITZERLAND
HONDURAS	THAILAND
ICELAND	TURKEY
INDONESIA	UKRAINE
IRAN (ISLAMIC REPUBLIC OF)	UNITED KINGDOM
IRELAND	UNITED REPUBLIC OF
ISRAEL	TANZANIA
ITALY	UNITED STATES
JAPAN	VANUATU
KUWAIT	VENEZUELA
LATVIA	

and the following Associate Members of IMO:

HONG KONG, CHINA  
FAROE ISLANDS

3 Representatives from the United Nations High Commissioner for Refugees and the World Maritime University participated in the session.

4 Observers of the following organizations took part in the session:

EUROPEAN COMMISSION (EC)  
INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS (IOPC FUNDS)  
INTERNATIONAL CHAMBER OF SHIPPING (ICS)  
INTERNATIONAL UNION OF MARINE INSURANCE (IUMI)  
INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS (ICFTU)  
INTERNATIONAL MARITIME COMMITTEE (CMI)  
INTERNATIONAL ASSOCIATION OF PORTS AND HARBORS (IAPH)  
BIMCO  
INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES (IACS)  
EUROPEAN CHEMICAL INDUSTRY COUNCIL (CEFIC)  
OIL COMPANIES INTERNATIONAL MARINE FORUM (OCIMF)  
INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS (IADC)  
INTERNATIONAL ASSOCIATION OF PRODUCERS OF INSURANCE AND  
REINSURANCE (BIPAR)  
INTERNATIONAL FEDERATION OF SHIPMASTERS' ASSOCIATIONS (IFSMA)  
INTERNATIONAL SALVAGE UNION (ISU)  
INTERNATIONAL ASSOCIATION OF OIL AND GAS PRODUCERS (OGP)  
INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS  
(INTERTANKO)  
INTERNATIONAL GROUP OF P AND I ASSOCIATIONS (P AND I CLUBS)  
THE INTERNATIONAL TANKER OWNERS POLLUTION FEDERATION LTD  
(ITOPF)  
INTERNATIONAL SHIP SUPPLIERS ASSOCIATION (ISSA)  
INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS  
(INTERCARGO)  
WORLD WIDE FUND FOR NATURE (WWF)  
INTERNATIONAL MARINE CONTRACTORS ASSOCIATION (IMCA)  
WORLD NUCLEAR TRANSPORT INSTITUTE (WNTI)

5 In his general welcome to participants, the Secretary-General extended a special welcome to those delegates attending the Legal Committee for the first time.

6 As this was the last occasion on which he would be speaking to the Committee as Secretary-General of IMO, he continued, he wished to make a few comments on the work of the Committee over the past decades and to express his appreciation for its achievements in the development of international maritime law.

7 He recalled that, at the time of the Committee's inception, the Organization only had one technical Committee – the Maritime Safety Committee - and the Legal Committee was initially brought into existence in 1967 as an *ad hoc* body to consider the legal implications of the **Torrey Canyon** incident. In particular, the Legal Committee had been tasked with the development of a liability and compensation regime for pollution damage caused by oil tankers.

8 This had led to the adoption of two Conventions, namely the 1969 Civil Liability Convention and the 1971 Fund Convention. The principles of strict liability, direct access and compulsory insurance which were incorporated into these Conventions were innovative and had

formed the basis of the award of compensation in all subsequent liability regimes developed in IMO.

9 In 1992, he continued, a number of important changes had been made by the Legal Committee in the form of Protocols to the two Conventions. These had not only substantially increased the amount of compensation available, but had also introduced the tacit amendment procedure to allow for further increases to be made expeditiously whenever necessary. Using this procedure, the Committee had already adopted new limits of compensation which would come into place as from 1 November 2003.

10 The steps taken by the Committee to enhance the availability of compensation for oil pollution damage, including most recently the Protocol of 2003, had demonstrated that the Organization could and would respond swiftly and that international regimes, developed under the auspices of IMO, were infinitely preferable to regional and national ones.

11 The regime of liability and compensation for ship-source pollution had been further enhanced, in 1996 and 2001, with the adoption of a regime for damage caused by the maritime carriage of hazardous and noxious substances (HNS Convention) and a regime for oil pollution caused by ships' bunkers (Bunkers Convention). With the adoption of the latter Convention, the Committee had essentially completed the task envisaged back in 1967, of developing a comprehensive international framework for liability and compensation for all ship-source pollution. It now remained for States to ratify these Conventions in order to bring them into force and the ongoing work undertaken by the Committee in monitoring the implementation of the HNS Convention was to be commended.

12 Safety of life at sea, the Secretary-General continued, had remained the key concern of this Organization since its beginning. The Legal Committee had played its part in supporting this work. Thanks to the Committee's efforts, the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, had been substantially updated and modernized by means of a Protocol adopted by a Diplomatic Conference during late 2002.

13 Nor, he continued, had the Committee neglected the other key aspect of the Organization's mandate - the protection of the marine environment. The 1989 Salvage Convention, initially developed by the Committee, had undoubtedly improved both the position of salvors and that of the marine environment by providing economic incentives for salvors to intervene with protective measures in respect of vessels which threatened the environment, extending even to situations where the vessel and its cargo could not be saved.

14 He emphasized the fact that the Committee's record was an impressive one, but its work was by no means complete. The tragic events of 11 September 2001 continued to reverberate in the maritime world. In response, IMO had already put in place a comprehensive Ship and Port Facility Security Code aimed at preventing terrorist acts directed against shipping.

15 The Committee's review of the Convention for the Suppression of Unlawful Acts against the Safety of Navigation and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (the SUA treaties), to which the Committee had rightly given high priority, would complement the Code and was another practical way in which the Organization could contribute to the battle against international terrorism. The importance attached to these treaties by the international community was shown by the fact that 95 States had become Parties to the Convention, 37 of them since 11 September 2001.

16 In this connection, the Secretary-General continued, the Committee would need to give further thought as to when a diplomatic conference should be convened to adopt the new instruments. Since it had already been decided to hold a diplomatic conference in 2004 to adopt the ballast water management convention, he hoped that the SUA Protocols would be ready for consideration by a diplomatic conference in 2005.

17 Because the Organization had directed that only one diplomatic conference should be held in an Assembly year, he said, the earliest date for the convening of a conference on wreck removal, another priority item on the Committee's agenda, would be in the 2006-2007 biennium. He understood, however, that progress had been made on the draft wreck removal convention, so it was possible that a conference could be convened in 2006. He knew that the Committee had devoted a great deal of time and effort to both of these two priority items and he looked forward to seeing the completion of work in the near future so that the Organization could continue to satisfy the expectations of the international maritime community for legal regimes in both these important areas.

18 The Secretary-General drew attention to the fact that the Committee had many other topics to consider at this session and he felt sure that under the direction of its Chairman, it would continue to make significant progress. He did not propose to enter into each one in detail, but mentioned only one or two which had a bearing on work in other IMO Committees.

19 The first topic was the Committee's agenda item 7 – Places of Refuge. Recent events such as those involving the **Castor** and the **Prestige**, had served to indicate how urgent it was for the Organization, both for safety and environmental reasons, to put in place guidelines dealing with places of refuge. But in order to finalize the guidelines, there were some legal issues which were identified in the submissions before the Committee, which would require resolution. In the longer term, the questions of compensation and liability would also need the Committee's attention.

20 The second topic concerned the designation of a Western European Particularly Sensitive Sea Area (PSSA), which was considered by the Marine Environment Protection Committee (MEPC) last July. The Legal Committee, he said, had been requested to give advice on certain legal issues, which would assist the decision by the MEPC when it reconvened next year.

21 The Secretary-General stressed that he was confident that the Legal Committee would join him in acknowledging the leading role its Chairman had played in ensuring its success. It was, he said, timely for him to express his sincere thanks for the Committee's hard work and his admiration for its skill in helping it arrive at the right decisions.

22 Finally, the Secretary-General wished the Committee every success in its deliberations during the coming week. As usual, he said, the resources of the Secretariat were at its disposal. He ended by wishing the Committee well for its future work in resolving the many challenging tasks still to come. He would continue to follow the work of the Committee with interest.

23 The Chairman of the Legal Committee paid tribute to the Secretary-General and thanked him both on his own behalf and that of the Committee for the leadership and support he had provided to the Committee during so many years of dedicated service.

24 The agenda for the session, as adopted by the Committee, is attached as annex 1.

25 A summary of the deliberations of the Committee with regard to the various agenda items is set out hereunder.

## **B REPORT OF THE SECRETARY-GENERAL ON CREDENTIALS**

26 The Committee noted the report by the Secretary-General that credentials of the delegations attending the session were in due and proper form.

## **C ELECTION OF OFFICERS**

27 The Committee unanimously re-elected by acclamation Mr. A.H.E. Popp, Q.C. (Canada) as Chairman for 2004. The Committee also re-elected by acclamation Mr. Kofi Mbiah (Ghana) and Professor Chai Lee-Sik (Republic of Korea) as Vice-Chairmen for 2004.

## **D DRAFT CONVENTION ON WRECK REMOVAL (agenda item 4)**

28 The Committee continued with its consideration of this agenda item.

29 The delegation of the Netherlands, as lead country for the intersessional consultations, introduced document LEG 87/4. In so doing, it summarized the results of the consultations and explained the content of the annexes to the document. It made the point that the text represented a compromise and reflected the decisions of the Working Group taken at the eighty-sixth session of the Legal Committee. The delegation expressed the hope that sufficient progress would be made at this session in order for the draft to be ready for submission to a diplomatic conference, if possible, during the 2004-2005 biennium.

30 The delegation of the United Kingdom, on behalf of all co-sponsoring delegations introduced document LEG 87/4/1. Their intention was to respond to the concern expressed by certain States about the need to reconcile the draft wreck removal convention (DWRC) with the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), particularly on the issue of flag State consent. In this connection, the co-sponsors proposed the addition of a new paragraph in article 10 to provide for flag State consent to the exercise of jurisdiction by a coastal State, where such jurisdiction is not provided for under other existing treaties.

31 The Committee then proceeded to discuss the following issues:

- Reporting requirements (article 6, paragraph 1);
- Exclusion of acts of terrorism (article 11, paragraph (c));
- Relationship to other liability instruments (article 12, paragraph 1); and
- Safeguarding sovereign rights on the high seas (article 2, paragraph 4).

### **Reporting requirements (article 6, paragraph 1)**

32 Most delegations who spoke were of the opinion that the text in square brackets in article 6(1) should be deleted, on the basis that it was unnecessary to include it, since the reporting requirements were set out in some detail in paragraph 2.

33 The observer delegation from the International Chamber of Shipping (ICS) pointed out that in modern shipping management practice the registered owner is not normally in charge of the day-to-day operation of the ship and, accordingly, might not be able to comply with this requirement. The focus should instead be on the operator or manager of the ship. This remark was endorsed by some delegations, although it was noted that the registered owner might still have obligations under other articles of the draft convention.



34 The point was made that reports should be submitted in a timely manner, otherwise this provision would be of little practical use.

35 The Committee decided to delete the wording in square brackets in article 6(1). It requested the Working Group to examine whether the obligation to report should be placed on the registered owner or whether it might be better for other parties, such as the operator or the manager of the ship, to assume this obligation. The Working Group was also directed to discuss whether to insert a time limit for reporting.

#### **Exclusion of acts of terrorism (article 11, paragraph c)**

36 The observer delegation from the International Group of P & I Associations, supported by other delegations expressed the view that the exclusion of acts of terrorism should be provided for in paragraph (a) rather than included separately under paragraph (c). The issue was one of availability of insurance for such risks.

37 Other delegations disagreed with this suggestion on the basis that the registered owner should not enjoy a blanket exemption if he was at fault. It was further suggested that whatever solution was adopted it should be consistent with other liability regimes. Another suggestion was to delete paragraph (c) altogether.

38 The Committee decided that this issue required further consideration by the Working Group, taking into account comments at this session.

#### **Relationship to other liability instruments (article 12, paragraph 1)**

39 The Committee discussed article 12(1), which contained a proposal intended to clarify the relationship of the draft convention to other instruments on liability and compensation. In particular, the Committee agreed in principle on the need to avoid double compensation for the location, marking and removal of wrecks. One suggestion was to replace the words “is established” in the chapeau with the words “is within the scope of application of” and delete the opening words “for damage as defined in” in subparagraphs (a) to (d). It was also noted that it was important to be able to determine which instrument applied in any particular case.

40 The Committee requested the Working Group to examine this further, taking into account that there may also be situations in which, although the matter might be within the scope of another liability convention, that convention might exclude the award of compensation.

#### **Safeguarding sovereign rights on the high seas (article 2, paragraph 4)**

41 The Committee considered a proposal in article 2(4), developed during intersessional consultations on safeguarding sovereign rights on the high seas under the draft convention. The Committee agreed that the proposed text reflected a general principle of treaty law, to the effect that States Parties under the draft convention were not entitled to claim sovereign rights over any part of the high seas.

42 The view was expressed that, since this was self-evident as a matter of international law, it was not necessary to restate the principle in this convention. However, the view was also expressed that it was preferable to include the principle, since there were cases where coastal States had not established an EEZ. On the other hand, it was also observed that the same principle should apply to cases where an EEZ has been established.

43 Given the diversity of views within the Committee, which precluded a decision as to whether or not to retain this clause, the Working Group was asked to consider the matter further.

**Flag State consent** (article 10, paragraph 10)

44 The Committee agreed in principle that the draft convention should include a provision along the lines proposed in document LEG 87/4/1 to the effect that, by becoming a State Party to the convention, a State would automatically give its consent (as a flag State) to the State Party whose interests are most directly threatened by the wreck to act under paragraphs 4 to 8 of article 10.

45 The Committee accordingly referred this draft article back to the Working Group with the instruction to revisit the wording.

46 The Committee then considered the amended text of the draft convention as presented in annex 1 to document LEG 87/4 with the purpose of reaching agreement on the bold underlined text which had been developed and agreed during the intersessional consultations but which had not yet been considered by the Committee. The following decisions were taken by the Committee:

**Definition of “Wreck”** (article 1, paragraphs 4(c) and 4(d))

47 The Committee agreed that the addition of the word “adrift” in paragraph 4(c) was editorial.

48 One delegation expressed concern about including paragraph (d) in the definition of “wreck” as it related to future, rather than past events. However, it was noted that the definition of this term had been extensively debated by the Committee and it was important to have specific concerns explained before the debate was generally re-opened. It was also noted that the definition of “wreck” should not be considered in isolation and that what action might be taken in respect of a wreck was dependant upon other provisions elsewhere in the draft convention.

49 The Committee referred this definition to the Working Group for further consideration in light of the comments made during the discussion. In so doing it noted that, rather than focus on the bold, underlined text, the Working Group should take up the broader issue, but with the *caveat* that the definition should not be read in isolation.

**Definition of “Related interests”** (article 1, paragraphs 6(a) and 6(d))

50 The Committee considered the proposal to insert the word “and” in paragraphs 6(a) and 6(b). The view was expressed that the use of the conjunction “and” might suggest that a combination of interests or conditions must be found to exist in a particular case rather than a single interest or condition and that, accordingly, the conjunction “or” might be preferable. However, the view was also expressed that, since the conjunction “and” was already used in paragraphs 6(b) and 6(c) there was no risk that the text would be given a cumulative interpretation.

51 The Committee agreed to maintain the existing text.

**Rights of States Parties to take measures (article 2, paragraph 1)**

52 The Committee agreed that the addition of the words “in relation to the removal of” in article 2(1) was editorial.

53 The Committee considered a proposal to add the words “of other States Parties” after the word “wreck”. It was explained by the proposing delegation that this wording would clarify that the draft convention does not bind or otherwise affect the enjoyment of rights of non-Parties, and the paragraph would then be compatible with UNCLOS Article 311(3).

54 A number of delegations considered that these words would unduly restrict the scope of application of the draft convention and would have the effect of limiting a coastal State’s right to intervene to remove a wreck. The view was also expressed that such a limitation would not be consistent with UNCLOS or with the Intervention Convention, under which, in their opinion, coastal States had the right to intervene to remove a wreck which posed a serious threat not only to the marine environment, but also to the safety of navigation. However, several delegations expressed the view that it is a basic principle of international law that a treaty instrument should not have an adverse effect on the rights of a State which was not party to the instrument.

55 The Committee decided to refer the matter to the Working Group for further consideration.

**Rights of States Parties to take measures (article 2, paragraph 3)**

56 The Committee agreed that the addition of the words “unnecessarily” and “concerned” in article 2(3) was editorial.

**Rights of States Parties to take measures (article 2, paragraph 5)**

57 The Committee agreed to the addition of the words “shall endeavour to” in article 2(5).

**Declaration on application to wrecks in territorial seas (article 3, paragraph 2)**

58 The Committee noted that specific cross references to other articles would have to be decided in due course, and in the meantime referred the paragraph to the Working Group to discuss the implications of opting-in or opting-out of particular articles for matters such as insurance.

**Reporting wrecks (article 6, paragraph 1)**

59 The Committee agreed to insert the word “their” in article 6(1).

60 One delegation also suggested that the article be amended to include a provision for States Parties to notify the Secretary-General of any reports, made in line with other IMO Conventions.

**Reporting wrecks (article 6, paragraph 2(d))**

61 The Committee referred this paragraph back to the Working Group to ensure consistency with other articles.

**Reporting wrecks** (article 6, paragraph 2(e))

62 The Committee agreed to the addition of the reference to “bunker oil”.

**Determination of hazard** (article 7, paragraph (d))

63 It was noted that the new text is intended to ensure consistency between the references to particularly sensitive sea areas and UNCLOS Article 211(6). The Committee agreed to the new text of article 7(d).

64 The view was expressed that article 6 on the reporting requirements and article 7 on the use of reported information in determining whether a wreck poses a hazard must be aligned. Furthermore, it was also noted that these articles might need review in light of the definition of “related interests” in article 1(6), because, as presently drafted, that definition appeared to be broader than the State interests identified in article 7.

**Determination of hazard** (article 7, paragraph (h))

65 The Committee agreed to the addition of the reference to “bunker oil”.

**Locating wrecks** (article 8, paragraph 1)

66 The Committee agreed that the word “wreck” should be used at the end of the paragraph, replacing the word “hazard”.

**Locating wrecks** (article 8, paragraph 2)

67 The Committee agreed that the word “precise” added clarification to this paragraph.

**Marking of wrecks** (article 9, paragraph 3)

68 It was suggested that the reference to “use of nautical charts” may be too narrow and might be replaced with wording along the following lines: “use of appropriate nautical publications or and by other appropriate means.” The view was also expressed that there was an existing system of notification to mariners and it was unnecessary for the new convention to create a new obligation.

69 The Committee referred this paragraph to the Working Group for further consideration.

**Measures to facilitate the removal of wrecks** (article 10, paragraph 1(b))

70 The Committee agreed to the proposed wording which clarified the subject matter of the consultations.

**Measures to facilitate the removal of wrecks** (article 10, paragraph 6(a))

71 The Committee agreed to use the word “shall” instead of the word “may”.

**Measures to facilitate the removal of wrecks** (article 10, paragraph 7)

72 The Committee agreed to the proposal in principle, but noted, as it did in connection with article 6(1), that the term “registered owner” may not be appropriate in this context since it was an operational matter. The matter was referred to the Working Group for further consideration.

**Measures to facilitate the removal of wrecks** (article 10, paragraph 9)

73 The Committee noted, as it did in connection with article 6(1) and article 10(7), that the term “registered owner” may not be appropriate in this context since it was an operational matter.

74 It was also noted that placing the obligation on a State Party to “ensure” compliance might require such States to play an active enforcement role, and may not be practicable. The view was expressed that the intent of the wording was to ensure that implementing legislation included actions to be taken in the event of non-compliance. It was suggested in this context that the wording of article 6(1) might be more appropriate.

75 The paragraph was referred to the Working Group for further consideration.

**Relationship to other liability instruments** (article 12, paragraph 1(a))

76 It was noted that this article did not have a title. It was also noted that the reference in paragraph 1(a) should be to “the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended”.

77 The Working Group was requested to look into these issues.

**Compulsory insurance or evidence of financial security** (article 13, paragraph 1)

78 The Committee agreed that one of the effects of having the reference to LLMC 1976, as amended, was to ensure that it would not be necessary for the registered owner of a ship to establish a separate limitation fund under the new convention on wreck removal.

79 The Committee agreed that the additional words “for the ship” were editorial. The Committee decided not to add the words “from time to time” in connection with the amendment of the LLMC 1976.

80 Since text in bold but not underlined in annex 1 to document LEG 87/4 had not yet been considered by the Working Group, the Committee decided to defer consideration of such text.

**Outcome of the Working Group**

81 Following these deliberations, the Committee agreed to send the draft WRC to a Working Group. The Chairman of the Working Group made an oral report to the Committee. In doing so, she mentioned, in particular, that the Working Group had based its discussions on the text contained in annex 1 to document LEG 87/4, and that, as instructed by the Committee, the Group considered the bold text, this being text which had not previously been considered by the Working Group. In addition, the Working Group discussed the comments and proposals that had been made during the plenary.

82 The Working Group also discussed a number of issues that delegations wished to consider within the context of the present draft. In this connection, she referred to the written report which appears at annex 2 to this report.

83 In particular, on the issue of the flag State consent, the Working Group approved the inclusion of a new paragraph 10 in article 10, as proposed in document LEG 86/4/1.

84 On the issue of the relationship between the DWRC and other liability instruments (article 12) the Working Group identified three issues that would require clarification during the intersessional consultations, namely:

- the need to avoid double claims;
- the need to avoid gaps, so that claims are dealt with either under the DWRC or under the other liability regimes mentioned in the article; and
- the need to avoid claims that are excluded under the other liability regimes being admissible under the DWRC.

85 As requested by the Committee, the Chairman then listed the main issues that, in the view of the Working Group, require further consideration:

- (i) Application of the DWRC to the territorial sea (article 3(2));
- (ii) Exclusion of liability for acts of terrorism (article 11(1)(c)); and
- (iii) Identification of the person normally in charge of the day-to-day operation of the ship who might not necessarily be the registered owner as presently defined in the Convention.

86 The Chairman concluded by noting that, although there were still some loose ends, the Working Group had made good progress in finalizing the draft text of the Convention in preparation for submission to a diplomatic conference.

87 The Legal Committee commended the efforts of the Working Group and agreed to the continuation of its work. The lead delegation was tasked with further refining the draft WRC. The Committee also agreed to consider the report of the Working Group at its eighty-eighth session, together with the revised draft WRC articles, time permitting.

**E REVIEW OF THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, 1988, AND ITS PROTOCOL OF 1988 RELATING TO FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF (SUA CONVENTION AND PROTOCOL)  
(agenda item 5)**

88 The Committee continued with the consideration of this agenda item.

89 The delegation of the United States, as lead country of the intersessional Correspondence Group, introduced document LEG 87/5/1 and highlighted the changes made to the draft SUA Convention on the basis of the Committee's deliberations and contributions received from the members of the Group.

90 The delegation of the International Confederation of Free Trade Unions (ICFTU) introduced document LEG 87/5/2 which contains proposals for the amendments to the draft prepared by the lead country.

91 The Secretariat introduced document LEG 87/5/3 containing draft final clauses.

92 The Committee noted that the basic text to be used in their deliberations would be the draft protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation contained in annex 1 of document LEG 87/5/1.

93 The Committee expressed its appreciation to the delegation of the United States as lead delegation and to the members of the intersessional correspondence group for the considerable work undertaken in the elaboration of the draft SUA protocols.

#### **Offences (article 3 bis)**

94 There was general agreement that the placement of the new offences in a separate new article (article 3 bis) represented a significant improvement.

#### **Chapeau**

95 The Committee generally supported the chapeau in article 3 bis(i)(a) containing the “terrorist motive”. It was suggested however that the language might need adjustment in the light of other international instruments, and, in particular, that the term “seriously” should be included before “intimidate” and “unduly” before “compel”. This proposal would bring the text into line with the EU Council Framework Decision of 13 June 2002 on combating terrorism.

#### **Paragraph 1(a)**

96 The Committee discussed the merits and shortcomings of the various options in subparagraphs (i) to (iv) and a number of delegations expressed their preferences, which varied widely. However, the Committee concluded that for the next session it would be necessary to reduce the number of options so as to enable the Committee to make some clear choices.

97 With regard to paragraph (ii), in the opinion of some delegations this did not appear to be a free-standing offence and it was suggested that it might be covered by article 3 *ter*.

98 With regard to paragraph (v), it was suggested that, if appropriate adjustments were made to the other offences, this paragraph might be redundant. Another possibility might be to move the paragraph to article 3 *ter*.

99 Attention was drawn to the term “substance” in paragraph (i) and it was suggested that, in order to make this term more precise, this paragraph might be merged with paragraph (iii).

100 Several delegations questioned the notion of “transports” in paragraph (ii) and in other provisions of the draft articles as being too imprecise for the purposes of criminal prosecution which requires a high degree of precision. An additional problem was the identification of the alleged offender given the large number of actors in the transportation chain. It was also noted that the action of transporting harmful material should be considered as a case of complicity rather than a self-standing offence.

101 With respect to “environmental damage” there was a conflict of opinion within the Committee, with some delegations suggesting that environmental damage could be considered as part of the wider concept of damage to property. Other delegations insisted however that this notion should be maintained, so as to cover cases such as ecological terrorism, which exceeds the notion of damage to property.

#### **Paragraph 1(b)**

102 The Committee noted that the purpose of this offence was to criminalize the act of transporting a fugitive with knowledge that the fugitive had performed an act constituting an offence under certain other treaties. Some delegations questioned the usefulness of this provision but others supported its retention.

103 Reservations were expressed about the broad scope of the provision and the reference to conduct criminalized by other treaties. The fact that the offence did not include the terrorist motive required in the preceding paragraph was also questioned.

#### **Paragraph 1(c)**

104 The Committee unanimously reaffirmed its concerns about the safety of international shipping and the use of weapons of mass destruction (WMD) for terrorist purposes. Some delegations also expressed concerns about the proliferation of WMD.

105 The view was expressed, in particular, that the inclusion of this paragraph in the SUA treaties could jeopardize the principle of freedom of navigation. In this connection, there was a general recognition of the need to revise the treaties but, at the same time, to do this in a way that would attract a large number of ratifications. Some delegations were in favour of deleting this paragraph altogether, noting that they did not understand the reasons for introducing into the SUA Convention non-proliferation provisions which did not fit with the objects and purposes of the Convention and which are regulated by other specific treaties and organizations such as the International Atomic Energy Agency (IAEA) and the Organization for the Prohibition of Chemical Weapons (OPCW). They did not consider the IMO to be the competent forum for dealing with non-proliferation issues nor the SUA Convention to be the appropriate instrument.

106 Those delegations that were ready to accept in principle the introduction of provisions on WMD suggested several modifications. These included the possibility of merging elements of paragraph 1(c) with elements of paragraph 1(a). In this regard several delegations pointed to the similarity of language used in paragraphs 1(a)(ii) and 1(c)(i) and the need to avoid duplication.

107 The lack of a reference to the terrorist motive in this paragraph was also a cause for some concern with some delegations suggesting that the mental element for these crimes should approximate that in the chapeau to paragraph 1(a). As already noted in connection with other paragraphs, concerns were also expressed about the notion of “transports”. There was a need, in particular, to protect the master and crew who under normal circumstances, would have no control over and often be ignorant of the reasons for, the transport of substances carried on board, and who were themselves the subject of contractual obligations.

108 The view was expressed that several expressions such as “precursors”, “hostile purposes”, “toxic chemicals”, “source or special fissionable material” and “double-use equipment” should be clearly defined and these definitions should be compatible with those in other international conventions.



109 Concerns were also expressed about the complexity of the language used in paragraph 1(c)(iii) and in this connection doubts were voiced that it might not be clear enough to support criminal charges.

110 It was also suggested that a specific provision be included to exclude from criminalization legitimate transportation allowed under other treaty regimes.

### **Boarding Provisions (article 8 bis)**

111 The Committee recognized that substantial revisions had been made to the text on the basis of intersessional consultations and noted that explanatory information on these revisions were provided in the footnotes in annex 1 of document LEG 87/5/1.

112 While there seemed to be general acceptance in the Committee on the need to include provisions concerning boarding in the draft protocol, it was clear that the present draft text would require substantial modification.

113 It was also generally accepted that the principle of flag State jurisdiction must be respected to the utmost extent, recognizing that a boarding by another State on the high seas could only take place in exceptional circumstances. Some delegations emphasized that boarding should take place only with the consent of the flag State.

114 The Committee considered a number of specific points raised by the draft text.

### **Paragraph 2**

115 A number of delegations expressed the view that the phrase “a ship flying its flag” was preferable to the phrase “a ship claiming its nationality” and should be used uniformly throughout, noting that this phrase would be consistent with terminology used in UNCLOS (e.g., Article 94).

116 One delegation proposed that the phrase “has reasonable grounds to suspect” should be replaced by the phrase “has clear grounds for believing.”

### **Paragraph 3**

117 With regard to the text in square brackets concerning authorization of boarding by a State Party who is unable to confirm nationality of the ship, the view was expressed that this provision would not be appropriate because it would be a major incursion on flag State jurisdiction over the ship, and it was not clear how a State which could not confirm that the ship was entitled to fly its flag had the authority to authorize boarding by another State. One delegation said that the current text did not clearly distinguish between the flag State’s role in confirming the nationality of the ship and its role in authorizing another State to board the ship.

118 With regard to the text in square brackets concerning a time limit for responding to a request for confirmation of nationality of a ship, the view was expressed that, while there may be a need for a time limit, the principle of allowing “silent consent” was inconsistent with the right of a flag State to exercise jurisdiction and the 4-hour time limit was impracticable. The question was raised regarding the starting point for running the clock on the four-hour limit.

**Paragraph 6**

119 It was proposed that the phrase “No additional measures would be taken” should be replaced by the words “No additional measures may be taken” to indicate the mandatory nature of this provision.

**Paragraph 7**

120 It was proposed that the words “assumed by the requesting Party” as used in the chapeau to this paragraph should be deleted on the ground that the boarding should be conducted in accordance with obligations under international law, not only those “assumed” by a Party.

121 With regard to the use of force provision in paragraph 7(a), one delegation queried whether the term “boarding officials” should be understood to include those on the mother ship who were overseeing the boarding.

122 A number of delegations expressed the view that the words “in strict accordance with applicable laws and policies of that Party” should be deleted since the use of force should be accordance with international law and in any case the reference to “policies” in this context was inappropriate.

123 The view was expressed that wording which required the use of force to be “the minimum reasonably necessary under the circumstances” was unclear, cumbersome and inconsistent with other international instruments on the use of force.

124 One delegation suggested it might be more logical to re-locate paragraph 7(a) to paragraph 9 on safeguards.

125 With regard to the right of self-defence in paragraph 7(b), several delegations expressed the view that this wording did not distinguish clearly between the right of self-defence claimed by a State under international law (as reflected in Article 51 of the Charter of the United Nations), and the right of self-defence claimed by law enforcement officials under domestic law. It was suggested that there may be no need for this provision in the draft protocol because it reflected existing international law.

**Paragraph 9**

126 With regard to paragraph 9(a), one delegation suggested that the safety and humane treatment of the crew, as well as passengers and stowaways, should be included as a consideration. In this regard, the observer organization of ICFTU noted that it had put forward a proposed new wording of paragraph 9(a)(v) in its document LEG 87/5/2, paragraph 15.

127 With regard to paragraph 9(b) on compensation for situations where the grounds for taking measures prove to be unfounded, the view was expressed that the phrase “consistent with their national laws” should be deleted since the determination of compensation should not be limited by the law of the State which is liable for the damage or loss. One delegation expressed the view that, while it may be necessary to pursue the claim in the courts of that State, it was improbable that compensation would ever be provided. This delegation said that the burden of proof that the grounds were well founded for boarding the ship should be on the State conducting the boarding.

128 One delegation expressed the view that the current text did not appear to adequately provide for compensation in the event of damage when the grounds for boarding proved to be unfounded.

129 One delegation suggested that paragraph 9(e) concerning uniforms might be unnecessary in light of the requirements for identification, under paragraph 9(d), of the ship carrying out the boarding.

#### **Paragraph 10**

130 One delegation expressed the view that this paragraph should remain in square brackets pending agreement on the other provisions in article 8 *bis*.

#### **Paragraphs 11 and 12**

131 One delegation suggested that the word “shall” could replace the phrases “are encouraged to” in paragraph 11 and “is encouraged to” in paragraph 12 to give these provisions a mandatory form.

#### **Paragraph 13**

132 Clarification was requested as to whether measures taken under article 8 *bis* were limited to those outside the territorial sea.

#### **Paragraph 16**

133 One delegation said this paragraph restated customary international law regarding ships without nationality and could be deleted. However, if it was to be retained, then the last sentence, which was unclear, should be revised or deleted.

#### **Other observations**

134 As a general comment on article 8 *bis*, one delegation queried what action the master, crew and shipowner should take to avoid prosecution if weapons of mass destruction were discovered on a ship while at sea.

135 The observer organization of ICFTU expressed the view that article 8 *bis* should provide for prior notification to the crew before a boarding took place in order to allow the crew to distinguish between a legitimate and an illegitimate boarding. In the view of this delegation, such a notification was essential to ensure that crews (a) were not vulnerable to criminals seeking to board the ship and (b) did not inadvertently take evasive action against legitimate boarding parties which they perceived to be a threat.

136 The observer organization of ICS expressed the view that the article raised many practical questions including (a) the shiphandling skills of those involved in manoeuvring to accommodate a boarding on the high seas; (b) the process by which the ship owner and master are informed that a request has been made to the flag State and are advised of what reply the flag State has given; (c) the responsibility for costs resulting from delay of the ship during its voyage and from inspecting cargo on board, which might require gaining access to containers; (d) determining who would be entitled to bring a claim when a safeguard was not respected, and in what jurisdiction such a claim could be brought; and (e) who was responsible for damage to cargo or injury to persons on board when the grounds for the boarding are well founded.

**Human rights** (article 10, paragraph 2)

137 The Committee considered a proposal in document LEG 87/WP.4 which was based on a proposal contained in paragraph 16 of document LEG 87/5/2. This proposal would introduce a new provision in the draft protocol to amend article 10(2) to ensure “fair treatment” of persons taken into custody pursuant to the amended convention. It was noted that this draft text was modelled on provisions in the International Convention for the Suppression of Terrorist Bombings and the Terrorism Financing Convention.

138 Several delegations offered preliminary comments on the proposal. In general there was support for adding a reference to human rights. However, further consideration was required. In particular, it was noted that the proposal required application of human rights law only under the law of the State in the territory of which the person in custody is present, though in the draft protocol the issue might also arise in situations when a ship is boarded on the high seas. In this connection it was suggested that the term “jurisdiction” was more appropriate than that of “territory”.

**Article 2 *bis***

139 The Committee considered a proposal contained in paragraph 7 of document LEG 87/5/2 concerning the insertion of the words “especially human rights law” in article 2 *bis*(1). As an alternative, one delegation suggested deleting the word “humanitarian” to change the reference to “international law” at the end of the paragraph. The view was also expressed that the wording of article 2 *bis* should remain unchanged. The Committee agreed that further consideration would be required before a decision could be taken.

**Final Clauses** (article 20 *bis*)

140 The Committee briefly considered document LEG 87/5 and noted that article 14 (article 20 *bis*) in that document had not been examined by the Secretariat because it raised issues of principle which had not yet been decided by the Committee. In particular, a decision was needed on whether a tacit amendment process was appropriate for amending the Annex in the draft protocol, and secondly on whether, if such a process was introduced, the process should be along the lines set out in the current draft or follow the formula used in other IMO Conventions. The Committee noted that the tacit amendment process had been employed in IMO instruments for some time for amending technical matters, and, more recently, for amending limitation amounts in liability and compensation conventions.

141 The view was expressed that the tacit amendment process should not be introduced in the draft protocol, but due to lack of time, a full discussion had to be deferred.

142 The Committee decided that work on this agenda item should be continued intersessionally through correspondence. The United States delegation will continue to act as co-ordinator of the Correspondence Group. The contact details of the co-ordinator, Ms Denise Manning, are: e-mail: [manningcad@State.gov](mailto:manningcad@State.gov). A report of the informal discussions is attached at annex 3 to this report. The terms of reference of the Group are attached at annex 4.

**F PROVISION OF FINANCIAL SECURITY (Agenda item 6)**

**(i) Work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers**

143 The Committee was informed by the Chairman of the Joint Working Group that, at present, only six replies had been received to the two questionnaires on the monitoring of the implementation of resolutions A.930(22) and A.931(22) and related Guidelines and only one reply had been received to the questionnaire on incidents of abandonment since 1 January 2003. The Chairman reminded the Committee of the importance of responding to these questionnaires. Answers to them would provide the basic information needed to enable the Joint Working Group to evaluate the implementation of those resolutions and Guidelines and to monitor recent incidents of abandonment.

144 The Chairman noted that information received would be compiled and submitted by the Joint Secretariat to the fifth session of the Joint Working Group, scheduled to take place from 12 to 14 January 2004, while the information on incidents of abandonment would be circulated in the form of composite periodic reports. Completed questionnaires as well as reports on incidents of abandonment could be submitted electronically by e-mail to IMO at: [info@imo.org](mailto:info@imo.org) and to ILO at [marit@ilo.org](mailto:marit@ilo.org).

145 The Chairman anticipated that the Group at its fifth session would continue with its examination of the issue of financial security for crew members and seafarers and their dependants with regard to compensation in cases of death, personal injury and abandonment. The Group would also monitor and evaluate the scale of the problem and make suitable recommendations to the IMO Legal Committee and the Governing Body of ILO. The Chairman noted that the IMO and the ILO Secretariats were still in the process of deciding how to organize and co-ordinate the work on the database on cases of abandonment.

146 The Committee thanked the Chairman of the Joint Working Group for the information provided and urged member States and organizations that had not done so, to send their responses to the questionnaires as soon as possible, in order to allow an evaluation by the Joint Working Group of the degree of implementation of Assembly resolutions A.930(22) and A.931(22) and the related guidelines.

**(ii) Follow-up on resolutions adopted by the International Conference on the Revision of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974**

**(a) Resolution on Regional Economic Integration Organizations**

147 The Committee took note that document LEG 87/6 submitted by the Secretariat provided the information requested by the Committee at its last session.

148 The Committee decided that this information should be retained for use in future treaty instruments to be developed by the Organization.

**(b) Circulation of questionnaire on bareboat charterer registration**

149 The representative of the CMI informed the Committee that numerous responses were being received to the questionnaire circulated by both the IMO Secretariat and the CMI. A report would be submitted for the consideration of the Committee at its eighty-eighth session.

**G PLACES OF REFUGE (agenda item 7)****Technical Guidelines**

150 The Committee considered the draft Assembly resolution on Guidelines on places of refuge for ships in need of assistance, as contained in the annex to document LEG 87/7. In response to the request of the Sub-Committee on Safety of Navigation, the Committee endorsed the location within the document of the cross reference to the list of conventions in appendix 1 (paragraph 1.11) and of the paragraph with the caveat on the issue of liability and compensation (paragraph 1.17).

151 The Committee also provided its guidance, as requested by the Sub-Committee, on which international instruments, including those addressing liability and compensation, should be included in the preambular paragraphs and appendix 1 to the annex to the draft Assembly resolution. The Committee recommended that the appendix should only include conventions which are in force. The revised list is provided at annex 5 to this report. In this connection, the Committee also recommended that paragraph 1.11 of the draft resolution should allow for the appendix to be kept up to date as other conventions come into force. In this regard the Secretariat was requested to draft an appropriate sentence for inclusion in the text.

152 The Committee noted that the draft resolution had been submitted to the twenty-third session of the Assembly for adoption and that its comments would be provided to the Assembly, and agreed that it was important that these Guidelines be adopted as soon as possible.

**Consideration of legal issues relating to liability and compensation**

153 The observer delegation of the CMI introduced document LEG 87/7/2 concerning its ongoing effort to examine liability issues relating to places of refuge. It informed the Committee that a longer report was available on its website ([www.comitemaritime.org](http://www.comitemaritime.org)) in the three working languages and that further work would be undertaken by its International Working Group on Places of Refuge and presented to the Legal Committee with a full analysis in due course.

154 The Committee expressed its appreciation to the CMI for this ongoing work.

155 The delegation of Spain introduced document LEG 87/7/1 and said it had some doubts about whether the current liability and compensation regime addressed all situations that might arise in connection with places of refuge. This delegation had identified seven situations that should be examined by the Committee in determining whether existing instruments are sufficient. These seven situations were described in document LEG 87/7/1, annex, paragraph 5, sections A to G. This delegation said it was not raising doubts about the effectiveness or validity of the existing regime, but only as to whether it adequately covered the identified situations.

156 It was noted that the situations identified in document LEG 87/7/1 raised four general questions:

- (i) Does a State violate its obligations under international instruments if it allows a ship to enter a place of refuge without proper insurance?
- (ii) Even if the ship concerned holds the proper insurance, does the State which allows the ship to enter a place of refuge have any liability in the event the insurance cover fails?
- (iii) If the shipowner loses the right to limit liability as a result of Civil Liability Convention provisions on breaking the limit, does the State which allowed the ship to enter a place of refuge have any liability?
- (iv) Does the current regime permit the payment of fixed costs?

157 The Committee noted that the 1992 IOPC Fund Assembly had established an Intersessional Working Group to assess the adequacy of the international compensation system created by the 1992 Civil Liability and FUND Conventions, and that the questions raised in document LEG 87/7/1 could be relevant to that Group's assessment.

158 The Committee also noted that the questions could also be pertinent to the examination being undertaken by the CMI on the subject of places of refuge.

159 The Committee recognized that ultimately it would be responsible for reaching conclusions on whether the current liability and compensation regime is adequate to cover situations in which a ship in distress was granted or denied access to a place of refuge. This was reflected in the preamble to the draft Assembly resolution on Guidelines on places of refuge for ships in need of assistance which includes the following operative paragraph: "REQUESTS the Legal Committee to consider, as a matter of priority, the said Guidelines from its own perspective, including the provision of financial security to cover coastal State expenses and/or compensation issues; and to take action as it may deem appropriate."

160 Among the other views expressed in a preliminary consideration of the issues raised were the following:

- the issues raised by Spain merited careful study;
- to some extent the questions were abstract, theoretical or based on hypothetical conditions and it would be difficult to provide advice in the absence of specific fact situations;
- application of the existing liability and compensation Conventions did not seem to be unclear, though the interpretations made by national courts might be hard to predict;
- some of the issues raised by Spain might fit neatly into a review of Assembly resolution A.898(21) on Guidelines on shipowners' responsibilities in respect of maritime claims;
- the perception or concern that a gap might exist in the international liability and compensation regime could result from the fact that certain instruments such as the HNS Convention and the Bunkers Convention were not yet in force, and this kind of gap could be closed if States took steps to ratify these instruments;

- the fact that questions were being raised regarding the application or interpretation of the 1992 Civil Liability and FUND Conventions in the context of places of refuge should not be viewed as a sign that these instruments in themselves were insufficient or ineffective;
- the IOPC Fund will apply to ships without insurance, or where insurance proves to be ineffective;
- the 1992 Civil Liability and FUND Conventions were not originally designed specifically to address situations relating to places of refuge;
- it was important for the Committee to remain aware of relevant developments in other bodies (such as CMI and the IOPC Fund working group); and
- once the Committee had the results of the CMI analysis, it would be in a better position to address the issues raised by document LEG 87/7/1 and to decide what issues, if any, required further examination by the Committee.

161 While thanking the delegation of Spain for submitting a paper drawing attention to potential uncertainties and gaps in the system, several delegations expressed the view that they did not consider that the issues raised in document LEG 87/7/1 gave a proper reflection of the Conventions and the IOPC Fund practice. Further, they held the view that it is clear that the liability conventions cover ships in distress and the place of refuge situation.

## **H TREATMENT OF PERSONS RESCUED AT SEA (agenda item 8)**

162 The Committee took note of the information provided by the Secretariat contained in document LEG 87/8. The Committee noted that no legal issue had yet been referred to it and decided to remove this matter from its agenda. The Committee nonetheless reaffirmed its readiness to consider any legal issues that might be brought to its attention by other IMO bodies.

## **I CODE OF PRACTICE FOR THE INVESTIGATION OF CRIMES OF PIRACY AND ARMED ROBBERY AT SEA (agenda item 9)**

163 The Committee recalled that it had decided at its eighty-sixth session to keep this item on its agenda and in its work programme for the present session of the Committee and, if no submissions were received for the eighty-seventh session, it would report to the Assembly that no action has been required of the Committee. Having received no submissions for its consideration, the Committee so decided and agreed to remove this item from the Committee's agenda on the understanding that, if necessary, the Committee could return to the item in the future under Any Other Business.

## **J MEASURES TO PROTECT CREWS AND PASSENGERS AGAINST CRIMES COMMITTED ON VESSELS (agenda item 10)**

164 The Committee was provided with an interim report by the CMI on its on-going work to examine state practice on how crimes committed on vessels are handled in different jurisdictions. The representative of the CMI introduced document LEG 87/10 and informed the Committee that this interim report was based on sixteen responses to the questionnaire which the CMI had developed in consultation with the IMO Secretariat. Further work would be undertaken by the CMI working group on crimes committed on the high seas on foreign ships, with the intent of having a final report for consideration at the Committee's eighty-eighth session.



165 The CMI representative said the preliminary indications were that many States did not consider the SUA Convention to apply to cases like the **Tajima**, where the crime was committed on the high seas and the alleged offender was not a citizen of the flag State. In these cases, the flag State would retain jurisdiction, though there might be concurrent jurisdiction with another State if the victim or alleged offender was a national of that State and the alleged offender was within that State's jurisdiction. Also, all States had universal jurisdiction over acts of piracy.

166 The delegation of Japan introduced document LEG 87/10/1 which commented on the interim CMI report in LEG 87/10 and provided a table to facilitate comparison of State practice. The table summarized the responses used in preparation of document LEG 87/10, along with others which had been received by the Organization subsequent to the submission of the CMI report. The delegation of Japan said its preliminary analysis indicated that:

- in certain cases, States do not have jurisdiction over the commitment of criminal offences under their criminal law if the offence was committed on a foreign vessel on the high seas. In these cases, only the flag State is deemed to have legal jurisdiction;
- most port States do not receive an alleged offender from a foreign vessel unless jurisdiction was established over the offence under their national law;
- cases similar to the **Tajima** cannot necessarily be solved under the SUA Convention since it requires the safety of navigation to be endangered; and
- States other than the flag State can detain and prosecute the alleged offender if they have established their jurisdiction over the offence and the offence is committed against a national.

167 The delegation of Japan introduced some examples as references to resolve this problem - port States have jurisdiction for cases when it is the first port of call after an offence has been committed on the high seas and the master has requested that the alleged offender be removed.

168 The view was expressed that it was already clear that some action by the Committee would be necessary and the options which had been identified at the Committee's eighty-sixth session (i.e., a legal scheme along the lines used in aviation, or a resolution on co-operation document LEG 86/15, paragraph 152 refers)) should be re-considered at a future session.

169 One delegation noted that its submission to the Secretariat had not been reflected in the interim CMI report (document LEG 87/10), but was included in the table in document LEG 87/10/1, though some details were not entirely accurate and would need to be adjusted. The delegation requested that its full submission be taken into account when the CMI submitted its final report. This delegation informed the Committee that it currently had national legislation to allow for jurisdiction in cases like the **Tajima**.

170 The Committee decided it was premature to engaged in a substantive discussion on this matter pending the receipt of the CMI report, and decided to retain this item on its work programme for the eighty-eighth session when it anticipated having the final CMI report for consideration. The Committee expressed its appreciation to the CMI for its on-going work in this area.

**K MONITORING THE IMPLEMENTATION OF THE HNS CONVENTION  
(agenda item 11)**

171 The delegation of the United Kingdom introduced documents LEG 87/11 and LEG 87/11/1 by reporting on the substantive progress made as a result of the Special Consultative Meeting of the HNS Correspondence Group that met in Ottawa on 3-5 June 2003. In particular, the delegation referred to paragraph 44 of document LEG 87/11 which proposes action to be taken by the Legal Committee on the basis of the conclusions of the Meeting. Mention was made of the fact that the core work of the HNS Correspondence Group had been completed. The HNS Correspondence Group would nevertheless continue to monitor progress on the implementation of the HNS Convention and report to the Committee, as appropriate. The delegation noted that the conclusions agreed by the Group provided valuable guidance on subjects such as insurance and insurance certificates, receivers, transshipments and reporting requirements. Papers submitted to the Ottawa meeting, contained in document LEG 87/11/1 and are also available HNS through the Correspondence Group website, (<http://folk.uio.no/erikro/www/HNS.hns.html>). These papers provide further information to those member States interested in adopting and implementing the HNS Convention.

172 The Committee agreed the action points in paragraph 44 of document LEG 87/11 and, in particular, that the outcome of the Ottawa meeting represented the best approach for implementation of the HNS Convention.

173 The Committee took note of the information and thanked the delegation of the United Kingdom for its leadership in the management of the HNS Correspondence Group activities and the delegation of Canada for hosting the Special Meeting. The Committee expressed its wishes that the outcome of the work of the HNS Correspondence Group would help to decisively speed up the process of ratification of the HNS Convention.

174 The Committee agreed that a progress report on this agenda item would be provided to the next IMO Assembly.

**L REVIEW OF THE STATUS OF CONVENTIONS AND OTHER TREATY INSTRUMENTS ADOPTED AS A RESULT OF THE WORK OF THE LEGAL COMMITTEE (AGENDA ITEM 12)**

175 The Committee took note of the information provided by the Secretariat in documents LEG 87/12 and LEG 87/WP.2 on the status of conventions and other treaty instruments adopted as a result of the work of the Legal Committee.

**M MATTERS ARISING FROM THE NINETIETH SESSION OF THE COUNCIL  
(agenda item 13)**

176 The Legal Committee took note of the information in document LEG 87/13.

177 In particular the Committee noted the draft guidelines on access of news media to the proceedings of institutionalized Committees and of their subsidiary bodies contained in the annex to that document. One delegation suggested that there may be practical problems with the implementation of paragraph 7 of the draft Guidelines.

178 The Committee decided to review the draft Guidelines at its next session with a view to responding to the request of the Council.

**N WORK PROGRAMME AND LONG-TERM WORK PLAN  
(agenda item 14)**

179 The Committee was informed that, in the next biennium, only one slot was available for the holding of a legal diplomatic conference. Therefore, despite the decision by the Council at its ninetieth session to approve, on a provisional basis, that provision be made for the convening of two diplomatic conferences in the 2004-2005 biennium, only one conference could be convened in that biennium. Therefore the other legal conference would have to be deferred to the biennium 2006-2007. In the light of the above information, the Committee had to decide whether the draft wreck removal convention or the draft SUA protocols should be considered for a conference in 2005. Any decision on that matter would also impact on the work of the Committee for its next session.

180 There followed an extensive debate on which of the two items should be given priority.

181 While acknowledging the political importance of concluding the revision of the SUA protocols as soon as possible, in order to complement the technical measures already adopted by the Organization to combat terrorism at sea, the delegations supporting priority for the draft WRC commented, *inter alia*, that:

- The draft WRC had been on the Legal Committee's agenda for some time and had been overtaken previously by other subjects of higher priority which had emerged;
- While the political aspect is important, in planning for a diplomatic conference, account should be taken of the readiness of the text for submission to a diplomatic conference;
- The text of the draft WRC was sufficiently well developed to assure its adoption by a diplomatic conference in the next biennium; and
- Some doubt was expressed whether the SUA project would be ready for a diplomatic conference in the next biennium.

182 The delegations in favour of priority for the draft SUA protocols commented, *inter alia*, that:

- The progress on this item had been remarkable considering the short period of time the Committee had been working on the revision of these treaties;
- The pace of ratification of the SUA treaties had significantly increased indicating the importance of these instruments to the international community;
- The Committee had to participate fully in the Organization's efforts to protect the maritime world from terrorism, as requested in resolution A.924(22); and
- If the revision of the SUA treaties were to be given priority, work towards the finalization of the drafts would proceed with increased impetus.

183 The Committee noted, in this connection, the statement by the delegation of the United States as the lead delegation in the SUA revision that, although some fundamental issues needed to be resolved, it was pleased with the degree of progress of the draft SUA protocols

during the short period. The delegation also stated that, in the event that additional intersessional work was needed, it would consult with its Government on the possibility of expediting the process in the same way as had occurred for the technical measures adopted in December 2002.

184 The Committee also noted that should one conference take place in 2005, the other conference could take place in 2006, thus the difference in time between the two diplomatic conferences would in fact be less than one year.

185 The Committee agreed to recommend to the Council that a diplomatic conference be held during the next biennium. The Committee also agreed that, at its eighty-eighth session, it would work, on a priority basis, on the revision of the SUA treaties and for that purpose it would also establish a Working Group. The Committee agreed, however, that work would continue on the DWRC, as time permitted.

186 The Committee also agreed to request the Council to make provision for another diplomatic conference as early as possible in the 2006-2007 biennium.

187 In light of the above decisions, the Committee requested the Secretariat to make appropriate changes to its work programme and long-term work plan. The Committee also requested the Secretariat to update the work plan. The updated version is provided at annex 6 to this report.

#### **O TECHNICAL CO-OPERATION: SUBPROGRAMME FOR MARITIME LEGISLATION (agenda item 15)**

188 The Committee took note of the information contained in document LEG 87/15 and its annex.

189 The delegation of Ecuador expressed its appreciation for the assistance it had received from the Technical Co-operation programme.

190 The Director of the Technical Co-operation Division (TCD) informed the Committee that Council had approved the Integrated Technical Co-operation Programme (ITCP) for 2004/2005. Funding of \$7.8 million was anticipated for this programme, 46% of which would come directly from the Organization's Technical Co-operation Fund. He also informed the Committee that the International Maritime Security Trust Fund had been established, with Council approval, and this fund would be supporting national initiatives focussing on enhancing maritime security. One of the emphases would be in the area of national legislation, for which the programme would require legal advisors. In this regard he expressed the hope that delegations would identify individuals, including legal experts, who might be willing to serve in this capacity.

191 The Committee took note of this information.

#### **P ANY OTHER BUSINESS (agenda item 16)**

##### **(a) Report on the 2003 International Conference on the Establishment of a Supplementary Fund to the 1992 Fund Convention**

192 The Committee noted the report on the outcome of the 2003 International Conference on the Establishment of a Supplementary Fund to the 1992 Fund Convention, including the three Conference Resolutions, as provided in document LEG 87/16.

193 One delegation expressed the view that reference had to be made in the long-term work plan to the third Conference Resolution on review of the international compensation regime for oil pollution damage, in connection with possible comprehensive revision of the Civil Liability and Fund Conventions. The Committee endorsed this view.

**(b) Designation of a Western European Particularly Sensitive Sea Area (WE PSSA)**

194 The delegation of the Russian Federation, on behalf of the co-sponsoring delegations, introduced document LEG 87/16/1 in which the Committee was invited to consider the legal implications of the proposal to designate a Western European PSSA. The Committee also took note of comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALOS) on the relationship of the PSSA designation and the United Nations Convention on the Law of the Sea (UNCLOS) in particular, article 211(6). At the request of the Committee these comments were reproduced in document LEG 87/WP.3, and appear as annex 7 to this report.

195 The Committee noted that the comments by DOALOS on UNCLOS were intended only as a contribution to the debate and did not represent a conclusive opinion. It was a matter for States to interpret the Convention.

196 Some delegations agreed with the contents and conclusions of document LEG 87/16/1. In their view, the designation of a WE PSSA exceeded the restrictive framework regulated by article 211(6) of UNCLOS for the adoption of exceptional measures to protect coastal waters. As a result, the designation of a PSSA, even if not in contradiction with the text of article 211(6) ignored its restrictive meaning in favour of an excessively liberal interpretation. The area was too extensive and, unlike the case of the Great Barrier Reef, involved different ecosystems. The implementation of PSSA measures in such a vast and diverse area could be an unwelcome precedent that could trigger initiatives to adopt similar measures in other parts of the world.

197 In connection with the measures associated with the PSSA designation, it was noted that even if the coastal States involved had agreed not to include the banning of single hull tankers in the PSSA, the proposal for an associated protective measure imposing a reporting obligation with a 48 hour notice period represented an unacceptable restriction to freedom of navigation. In this regard, reference was made to DOALOS comments in the sense that, if the 48 hour notification requirement was used as a basis for prohibiting entry into the WE PSSA, then the prohibition would violate the principle of freedom of navigation. In the opinion of these delegations the 48 hour notification would inevitably lead to prohibitions of this kind. Otherwise, it would be difficult to ascertain the added value implication of this designation.

198 Some other delegations reaffirmed the legitimacy of the WE PSSA designation. They highlighted the fact that this designation had been done as part of a process where due consideration had been given to all technical aspects referred to in the Guidelines for such designation contained in resolution A.927 (22). These Guidelines did not restrict the size of the area and allowed for the existence, within a single PSSA, of more than one ecosystem. The designated WE PSSA was one of the most intensive transited areas in the world; the limits had been established bearing in mind that it was the area that had been most affected by catastrophic shipping incidents since the **Torrey Canyon** in 1967. The area did not only serve navigational purposes but other equally legitimate interests; it contained habitats requiring particular protection in order to guarantee the survival of fishing and tourism, both of vital importance for the subsistence of coastal communities and, consequently, the economic and social interests of the coastal States.

199 Particular emphasis was given to the procedural aspects involved in the PSSA designation and the adoption of associated measures. It was noted that this procedure was being developed bearing in mind IMO's mandate and in accordance with pre-established rules governing the activities of the different deliberating bodies of the Organization, such as MEPC, MSC and the NAV Subcommittee. The 48 hours notification measure, as well as any other additional measures that might be considered in the future, would have to be assessed by these bodies, so that their implementation would reflect the agreement of IMO Member States.

200 Note was taken of the assurance given by some delegations to the effect that this measure would not be used as a basis to prohibit legitimate use of the PSSA by shipping in accordance with the principle of freedom of navigation.

201 Several delegations noted the need for further study of the legal implications of the designation of the WE PSSA area, in particular in the light of the comments made by DOALOS.

202 It was noted that the MEPC had not referred the question to the Legal Committee. The Committee recognized, however, that any delegation was free to bring questions of a legal nature to it. In the absence of any specific agenda item, the matter would be dealt with under "Any Other Business".

203 It was noted also that the Committee should not engage in a re-argument of the technical case for the designation of this PSSA or its associated protective measure, since these matters are beyond the purview of this Committee.

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## ANNEX 1

## AGENDA FOR THE EIGHTY-SEVENTH SESSION

Opening of the session

- 1 Adoption of the agenda
- 2 Report of the Secretary-General on credentials
- 3 Election of officers
- 4 Draft convention on wreck removal
- 5 Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 relating to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol)
- 6 Provision of Financial Security:
  - (i) progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding claims for Death, Personal Injury and Abandonment of Seafarers; and
  - (ii) follow-up on resolutions adopted by the International Conference on the Revision of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974
- 7 Places of refuge
- 8 Treatment of persons rescued at sea
- 9 Code of practice for the investigation of crimes of piracy and armed robbery at sea
- 10 Measures to protect crews and passengers against crimes committed on vessels
- 11 Monitoring the implementation of the HNS Convention
- 12 Review of the status of Conventions and other treaty instruments adopted as a result of the work of the Legal Committee
- 13 Matters arising from the ninetieth session of the Council
- 14 Work programme and long-term work plan
- 15 Technical Co-operation: subprogramme for maritime legislation

- 16 Any other business
- 17 Report of the Committee

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## ANNEX 2

**REPORT OF THE CHAIRMAN (NETHERLANDS) OF THE  
WORKING GROUP ON WRECK REMOVAL**

**Submitted to the Legal Committee at its eighty-seventh session**

1 As agreed by the Legal Committee when discussing the organization of its work for the session, after some of the major issues yet to be decided upon in the draft wreck removal convention (DWRC) had been considered in plenary, the work on this subject continued in a Working Group, meeting concurrently with the Committee. The Group met from the afternoon of Monday 13 to the evening of Wednesday, 15 October 2003 and was chaired by the delegation of the Netherlands.

2 The following delegations participated: Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, China, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Japan, Kuwait, Latvia, Liberia, Netherlands, Norway, Panama, Poland, Republic of Korea, Sweden, Turkey, United Kingdom and United States. The following observer delegations participated: Comité Maritime International (CMI), International Chamber of Shipping (ICS), International Group of P & I Associations (P & I Clubs), International Union of Marine Insurance (IUMI), International Tanker Owners Pollution Federation (ITOPF) and Oil Companies International Marine Forum (OCIMF).

3 The Working Group based its consideration on the text contained in annex 1 to document LEG 87/4. The document had been submitted by the delegation of the Netherlands as co-ordinator of the intersessional work. The revised draft had been prepared at the request of the Committee and in close consultation with interested delegations. The discussion took place in a positive and constructive manner.

4 The Group noted that the Committee had agreed on the wording underlined and in bold contained in the following articles:

Article 2.1, subject to considering an amendment proposal by the United States;  
Article 2.3;  
Article 2.5;  
Article 6.1, subject to refinement of the text on timing, authority and the general issue of registered owner;  
Article 6.2(d) and (e), subject to improving consistency with the text in article 7(h);  
Article 7(d);  
Article 7(h), subject to improving consistency with the text in article 6(d) and (e);  
Article 8.1;  
Article 8.2;  
Article 9.3, subject to considering an amendment proposal by the Bahamas;  
Article 10.1(b);  
Article 10.6(a);  
Article 10.7, subject to refinement of the text on the general issue of registered owner;  
Article 10.9, subject to realignment of the text with article 6; and  
Article 13.1, where the Committee had agreed to delete the wording “from time to time” at the end of the paragraph.

5 In keeping with the mandate of the Committee the Group discussed the following articles:

Article 1.4(d), proposal by Japan;  
Article 1.7, not yet discussed in plenary;  
Article 2.4, noting that in plenary one delegation was in favour of the deletion of the proposed text;  
Article 3(2), as suggested in plenary by Denmark;  
Article 10(3) to (5), since the proposed text had not yet been discussed in the Working Group;  
Article 11.1(c); and  
Article 12.1 (chapeau).

6 The Group further agreed to consider the following issues:

Flag State consent;  
Registered owner;  
Jurisdiction and enforcement;  
Definition of “wreck” (article 1.4 (c));  
Definition of “related interests” (article 1.6 (c));  
Definition of the “State whose interests are the most directly threatened by the wreck” (article 1.9);  
Definition of “Territorial Sea” (article 1.10);  
“State of the ship’s registry” (article 1.11).  
Definition of “warship” (article 1.12);  
Locating wrecks (article 8);  
Marking wrecks (article 9);  
Terrorism (article 11, 1 (c));  
Right to limitation (article 11.2);  
Settlement of disputes (article 16);  
Supersession clause (article 17);

#### **Article 1.4(d)**

7 The delegation of Japan introduced a written proposal aimed at clarifying at which point a “ship” reaches the threshold in order to qualify as a “wreck”, hence avoiding the possibility of different opinions between the Flag State and the Coastal State. In addition, or as an alternative, the delegation proposed to further elaborate the process of determination of the condition of “wreck”, for instance, by whom and through which procedures it would be determined if a particular ship should be considered a wreck or not.

8 While some delegations shared the concerns of Japan, other delegations could not agree with the proposal. It was noted in this connection that the decision on whether or not a ship could be considered a wreck constituting a hazard would be taken by the Coastal State only.

9 The Japanese delegation offered to prepare a paper intersessionally or submit a paper to LEG 88 on the issues encountered and their ramifications based on this discussion.

#### **Article 1.7**

10 The Working Group agreed to the deletion of the wording which appeared struck out at the end of the paragraph.

#### **Article 2.4**

11 The Working Group noted that the paragraph had been inserted to clarify that Coastal States could not extend their jurisdiction beyond the Territorial Sea on the basis of the DWRC.

12 One delegation intervened in favour of maintaining the paragraph. It noted that, although the issue was self-evident for States that have established an EEZ, it would help States that had not done so. The delegation recalled that the majority of the delegations who had intervened in plenary had favoured the retention of the paragraph, while only one delegation was for its deletion.

13 Some delegations supported the maintaining of the provision in the DWRC, while other delegations, noting that there was general agreement that the draft convention did not extend sovereign rights over the High Seas, proposed that the concept in the provision could be moved to the preamble to the convention.

14 The Working Group decided to maintain the text in article 2.4. Interested delegations were invited to propose draft texts for the preamble, either during the meeting or intersessionally.

#### **Article 2.5**

15 One delegation commented that the text in this paragraph could be simplified, and undertook to submit a written proposal.

#### **Article 3.2**

16 It was recalled that, as originally drafted, the DWRC was applicable beyond the Territorial Sea, with an “opting in clause” regarding application to the Territorial Sea. The Working Group, at its last session, had decided that it was preferable to specify in the clause to which articles the “opting in” would apply.

17 In this connection the following comments were made:

- The Working Group might have changed the original formulation in order to allow States parties more freedom of application in the territorial sea;
- The possible consequences of a selective application of certain articles only should be studied, particularly with regard to the relations among States Parties;
- Selective application would not facilitate uniform application, with the consequence of possible practical problems of implementation;
- A selective “opting in” clause may render it difficult for registered owners to determine which regime would be applicable to the territorial sea of a given country;

- Uniform application in the Territorial Sea would be essential, since the majority of wrecks requiring removal would normally be located there;
- Uniformity would only be achieved with a non selective opting in clause; and
- The operational parts of the DWRC could be applied in a selective way, while other parts of the draft convention, such as those regarding liability, should be applied in a uniform way.

18 The Working Group, noting that the issue on the application of certain articles of the whole DWRC to the Territorial Sea was of a substantive nature, and that as such it had to be decided upon by the Legal Committee, agreed to include in brackets both possibilities in the draft text, i.e. [articles ..... of the Convention] and [the Convention].

### **Article 10.3**

19 The Working Group noted that the text appearing in bold type was an editorial improvement to achieve consistency with article 13.1 and decided to approve it.

20 It was noted in this connection that the issue of consolidation of certificates of insurance prescribed under treaties of a similar nature regarding liability and compensation issues, should be discussed at a later stage.

### **Article 10.4**

21 The Working Group noted that the text appearing in bold type was an editorial improvement and decided to approve it.

### **Article 10.5**

22 The Working Group noted that the text appearing in bold type was an editorial improvement and decided to approve it.

### **Article 11.1(c)**

23 One of the two delegations that had proposed the draft text suggested that, in light of the comments in the Legal Committee, it would now prefer to solve the issue of the exclusion of liability of the registered owner for acts of terrorism in relation to other maritime conventions.

24 It was noted in this regard that the same arms are used in acts of terrorism as in acts of war, and that these have the same effect. The only difference among the two acts is the intent.

25 Other delegations favoured the present text. They noted in this regard that there was no reason for having exclusion provisions different from other liability regimes. They also noted that some of the wording in sub-paragraph (a), such as “inevitable”, was not appropriate in relation to acts of terrorism. Reference was made to the ongoing discussion in the IOPC Funds on the same subject.

26 Some delegations noted that, as formulated at present, the exclusion of liability for acts of terrorism which are wholly caused by third parties is covered under sub-paragraph (b).

27 An observer delegation proposed that under 11.1(c), the registered owner should be made liable only in respect of its acts or omission which had contributed to the loss or damage. At the request of the Chairman, the observer agreed to submit a proposal on a personal capacity.

28 Another observer delegation noted that while the insurance market had covered oil pollution damage under the Civil Liability Convention before and after 11 September 2001, the other liability regimes were new and not even in force. When in force, these will need additional cover from the insurance market and it remained to be seen whether the insurance market could provide such additional cover. It may then become necessary to find an appropriate solution.

29 The Working Group decided to leave unaltered the text in sub-paragraph (c), subject to examining the written proposal for amendment mentioned above.

## **Article 11.2**

30 One delegation noted that the wording of article 11.2 should be aligned with the wording of article 6 of the Bunkers Convention. Norway agreed to submit alternative wording intersessionally.

31 An observer delegation expressed concern that, as presently worded, there was no definite right for a registered owner to limit his liability under the instrument. It was agreed that the delegation could propose wording to meet its concern intersessionally.

## **Article 12.1**

32 The Working Group noted that, in accordance with the present wording, the registered owner would not be liable under the DWRC for the costs of the wreck removal operation if and to the extent that liability for such costs is already established under one of the four Conventions listed in paragraphs (a) to (d). It was further noted that the intent of the draft provision was to avoid paying compensation for the costs of the wreck removal activity twice under different liability regimes, or that a claim would not be paid under any of the regimes, and to ensure that the DWRC does not conflict with the other liability regimes.

33 One delegation proposed to change the wording “is established” with “is within the scope of application of”. The wording preceding the titles of the four Conventions listed in the subparagraphs could then be deleted.

34 An observer delegation suggested replacing the words “is established” with the words “has arisen under” and then listing the titles of the Conventions.

35 The Group agreed to leave the text of article 12 (chapeau) unaltered. Intersessionally a new text will be developed by interested parties to clarify the following issues:

- Avoid double claims;
- Avoid a gap so that claims are being dealt with in either the DWRC or the other liability regimes, mentioned in this article; and

- Avoid that claims being established under the DWRC are explicitly excluded under the other liability regimes, mentioned in this article.

36 Proposals for achieving this aim could be to replace the words “is established” with: “is within the scope of” or “has already arisen under”.

#### **Article 11.1 (c)**

37 The Working Group discussed the issue on the exclusion of acts of terrorism under this article. The Group concluded that this was a fundamental global issue and required the proper attention of the committee. The present text of subparagraph (c) was retained since the group could not reach agreement on amendment of this text.

#### **Article 7**

38 On the editorial issue of aligning the text of article 6 (Reporting wrecks) with article 7 (Determination of Hazard) one delegation made the following points: Duplication of items should be avoided. A link should be made in article 7 with the reporting in article 6. After discussions the delegation of Denmark offered to propose a text to this effect intersessionally.

#### **LEG 87/4/1: Flag State Consent under article 10**

39 The Working Group agreed on the proposal for a new paragraph 10 as proposed in the document. As stated in paragraph 13 of the document the new paragraph will not require any action or implementation on the part of the flag State. It is simply a statement of fact and will apply automatically when a State becomes a Party to the Convention. The proposed text is considered to be clear and unambiguous.

#### **Registered owner**

40 Registered owner is defined in article 1, 8. Some delegations considered that the use of this definition in articles 6 and 10 would not be applicable in practical situations such as when the wreck or its precise location needed to be reported. Other delegations pointed out that for the purpose of channelling the financial liability and insurance obligations the definition of the registered owner is appropriate. It was pointed out that splitting up operator from registered owner could have negative implications. The Group recognised the points made. The delegation of Norway offered to make a proposal intersessionally which replaces the definition of registered owner with “company” as defined in article 1.1.2 of the existing ISM-code, in the paragraphs dealing with the reporting and removing in articles 6 and 10.

#### **Article 1.6(c)**

41 One delegation proposed to replace the words “living marine resources” with “marine environment”. However this proposal was withdrawn, since it was noted that marine environment was specifically mentioned under paragraph 5(b) of the same article, while “living marine resources” referred to “related interest”.

## **Article 1.9**

42 One delegation suggested to condensate the definition in this paragraph with the purpose of simplifying the text of the draft convention. In particular it was suggested that the definition in this paragraph could read as follows:

“9. The most threatened State” means the State whose interests are the most directly threatened by the wreck and in whose convention area the wreck is located.”

Similarly another delegation proposed that the same paragraph could read as follows:

“9. “The affected State” is the State whose interests are the most directly threatened by the wreck and in whose convention area the wreck is located.”

43 Several delegations supported these proposals. The Working Group agreed to maintain the present text for practical purposes and that the proposal for simplifying the text would be taken on board during the final drafting process of the convention.

## **Article 1.4(c)**

44 For the sake of clarity, the delegation of Panama proposed to change the order of the words in this paragraph as follows:

“4(c) any object that is stranded, sunken or adrift at sea, that is lost from a ship at sea; or”.

45 This proposal was supported by other delegations. The Working Group, noting that it was a drafting point, agreed to take this proposal on board during the final drafting process of the convention.

## **Article 1.10**

46 One delegation, noting that the DWRC does not deal with the delimitation of maritime borders, proposed the deletion of this definition. Recalling that his country was not a party to the United Nations Convention on the Law of the Sea, 1982, the delegation stated that it would not be acceptable to include a reference to that Convention in the DWRC.

47 The majority of the delegations that intervened supported this proposal. In this regard it was noted that other liability conventions do not contain such definition. One delegation thought it was more appropriate to refer to UNCLOS.

48 The Working Group agreed to delete the definition of “Territorial sea” in article 1.10.

## **Article 1.11**

49 One delegation recalled its proposal at the eighty-fifth session of the Legal Committee to reinstate the definition of “flag State” in this article and to use this term throughout the DWRC, thus avoiding the legal uncertainty arising from the use of the term “State of the ship’s registry”, in particular in cases of bareboat charter registration.

50 It was recalled in this regard that, as a follow-up of a resolution of the International Conference on the Revision of the Athens Convention, 1974, the Organization, in collaboration with the CMI, was studying the current practice of bareboat charter registration and the implications for certificate-issuing obligations under the IMO liability conventions.

51 It was also recalled that the Working Group, at its last meeting, had decided that, pending discussion on this subject in the Legal Committee in relation to the Athens Convention, the definition of the “State of the ship’s registry” should be interpreted as the “flag State”, based on the 1982 UNCLOS Convention.

52 The Working Group agreed that it was preferable to wait for the result of that study, before taking a decision on the proposal.

#### **Article 1.12**

53 One delegation withdrew its reservation on this article, on the understanding that the reference to the 1982 UNCLOS Convention would have no effect on the position of its country vis-à-vis that Convention.

#### **Article 8**

54 One delegation proposed to replace the word “or” between “maritime casualty” and “a wreck” in the first line of that article with “resulting in”. The first line of the article would then read:

“1. Upon obtaining knowledge of a maritime casualty resulting in a wreck.”

55 Another delegation suggested that it would be preferable to delete the words “maritime casualty or” from the original wording, because in accordance with article 1.4, the concept of maritime casualty was a pre-condition for becoming a wreck. Several delegations supported the proposal.

56 The Working Group decided to amend the first line of draft article 8 to read as follows:

“1. Upon obtaining knowledge of a wreck the State”.

#### **Article 9**

57 One delegation introduced a written proposal on a new text for article 9. In this regard it was noted that it was a fundamental proposal, because it was shifting the responsibility for marking the wreck from the State to the registered owner.

58 One delegation, supported by other delegations, stated that the marking of wrecks was a traditional State’s responsibility and it should not be shifted to the registered owner without consulting the technical body of the Organization and other Organizations dealing with safety of navigation.

59 In view of these remarks, the Working Group decided to leave unaltered the text of draft article 9.



## **Article 10.8**

60 One delegation proposed the deletion of the words “or marking” in the third line of paragraph 8. The arguments for this proposal were that the current text could imply a possible delay for the coastal state wanting to undertake the marking of the wreck. In addition it was noted that this article dealt with measures to facilitate the removal of wrecks.

61 After discussion the Working Group approved the proposal to delete the words “or marking”.

## **Articles 8 and 9**

62 One delegation proposed the deletion of the articles 8 and 9. In the view of this delegation these articles were a duplication of existing systems (e.g. International Hydrographic Organization) and the only justification for having reference to the issues of locating and marking of wrecks in this convention is their link with the liability regime.

63 The Working Group considered these articles of importance for making the Convention operational. Following the discussions the delegation of Argentina agreed to submit a paper to LEG 88 on this issue.

## **Article 9.3**

64 A proposal to amend this paragraph was submitted in the light of the discussions held in plenary in conjunction with the proposal of the Bahamas.

65 After discussions the delegation of the Netherlands offered to submit a proposal amending the paragraph which would be based on the original proposal of the Bahamas, i.e. “in appropriate nautical publications and by other appropriate means” and the new proposal, i.e. “The particulars of the wreck marking shall be promulgated by the use of all possible means.....”.

## **Article 16**

66 Some delegations pointed out that the text as currently drafted presented a problem to those States that are not a party to UNCLOS. The Chairman noted that the issue of settlement of dispute was one of the final provisions to be negotiated at a later stage. One delegation pointed out that a possible way of solving the issue with the current draft would be to add the words “as appropriate” at the end of the article.

67 The Working Group concurred with the Chairman that this issue would be revisited at a later stage.

## **Article 17**

68 One delegation pointed out that the text as currently drafted presented a problem to those States that are not a party to UNCLOS. The delegation offered to submit comments on this issue intersessionally.

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## ANNEX 3

**REPORT OF THE INFORMAL WORKING GROUP ON THE REVISION OF THE  
SUA CONVENTION AND PROTOCOL**

**Draft revision to proposed article 3 *bis*, proposed article 3 *ter*  
and the proposed preamble to the Protocol to SUA based upon comments received  
from Legal Committee members**

**NOTE: this document is merely a working draft to assist members in reaching certain  
policy decisions. The United States delegation will be preparing a white paper to explain  
this draft and further clarify the policy options. The white paper will be circulated to the  
Correspondence Working Group**

ARTICLE 3 *bis*

1. Any person commits an offence if that person unlawfully and intentionally:
  - (a) when the purpose of the act is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act:
    - (i) uses against or on a ship or discharges from a ship any explosive, biological agent or toxin, toxic chemical or radioactive material[, or any substance in such quantity or concentration that it would have a similar effect,] that causes or is likely to cause, on or off the ship,
      - (I) death or serious bodily injury,
      - (II) extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system,<sup>1</sup> where such destruction results in or is likely to result in major economic loss, or
      - (III) [serious/extensive/substantial damage to the environment] [substantial damage to the quality of air, soil, water, animals or plants];<sup>2</sup>
    - (ii) uses a ship in a manner that causes or is likely to cause
      - (I) death or serious bodily injury,
      - (II) extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system, where such destruction results in or is likely to result in major economic loss, or

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<sup>1</sup> These are the more limited forms of "property" used in the Terrorist Bombings Convention (TBC). The TBC does not generally cover commercial property that doesn't have some type of public use.

<sup>2</sup> The second suggested option is language proposed by the delegation from France and is from the EU Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law.  
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- (III) [serious/extensive/substantial damage to the environment]  
[substantial damage to the quality of air, soil, water,  
animals or plants];
- (iii) threatens, with or without a condition, as is provided for under  
national law, to commit any of the offences set forth in  
subparagraph (i) or (ii).
- (b) transports another person on board a ship knowing that the person has  
performed an act that constitutes an offence set forth in any treaty listed in the  
Annex and intending to assist that person to evade criminal prosecution.

**ALTERNATIVE ONE**  
**OFFENCE FOR TRANSPORTING WMD AND NON-PROLIFERATION**  
**OFFENCE**

- (c) [***FIRST OPTION FOR OFFENCE FOR TRANSPORTING WMD IN  
WHICH TRANSPORTER MUST HAVE THE TERRORIST MOTIVE AT  
THE TIME OF TRANSPORTATION***] [transports on board a ship any  
explosive, biological agent or toxin, toxic chemical or radioactive material, or  
devices specifically designed to deliver such substances, when the purpose is to  
intimidate a population or to compel a Government or an international  
organization to do or to abstain from doing any act, and with the intent to use  
it,<sup>3</sup> or knowing that it is intended to be used to cause<sup>4</sup>
  - (i) death or serious bodily injury,
  - (ii) extensive destruction of a place of public use, State or government  
facility, infrastructure facility, or public transportation system,  
where such destruction results in or is likely to result in major  
economic loss, or
  - (iii) [[serious/extensive/substantial damage to the environment]  
[substantial damage to the quality of air, soil, water, animals or  
plants;]]]
- (c) [***SECOND OPTION FOR OFFENCE FOR TRANSPORTING WMD  
WHERE THE TERRORIST MOTIVE IS WITH RESPECT TO THE  
TERRORIST ACT AND NOT THE ACTUAL TRANSPORTATION***] [transports on board a ship any explosive, biological agent or toxin, toxic  
chemical or radioactive material, or devices specifically designed to deliver  
such substances, knowing that the substance is intended to be used to cause<sup>5</sup>
  - (i) death or serious bodily injury,

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<sup>3</sup> This requires the transporter to commit the violent crime.

<sup>4</sup> This requires the transporter to know that someone else has the intent to commit a violent crime.

<sup>5</sup> This covers activity where the transporter intends to commit the terrorist act or knows of intent of a third party to commit the terrorist act.

- (ii) extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system, where such destruction results in or is likely to result in major economic loss, or
- (iii) [[serious/extensive/substantial damage to the environment] [substantial damage to the quality of air, soil, water, animals or plants];]]

when the purpose of such act is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act;]

(d) **[NON-PROLIFERATION OFFENCE: OTHER THAN AS INDICATED BELOW IN (d)(i)(I) and (d)(ii), TRANSPORTER NEEDS TO KNOW THAT HE IS TRANSPORTING PROHIBITED ITEMS AND THAT IT WILL BE USED FOR OR AS A WEAPON/A HOSTILE PURPOSE.]** [transports on board a ship:

- (i)(I) **[TRANSPORTER NEEDS TO KNOW THAT HE IS TRANSPORTING A SCHEDULE 1 CHEMICAL]** any toxic chemical or precursor listed in Schedule 1 of Annex 1 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done 13 January 1993 at \_\_\_\_\_ (hereinafter referred to as the "Chemical Weapons Convention"), knowing it to be a toxic chemical or precursor listed on Schedule 1 Chemical [and to be transferred to a non-State actor or a State not a party to the Chemical Weapons Convention];<sup>6</sup>
- (II) toxic chemicals or their precursors knowing that they are intended for use as a weapon or for the production of a weapon or are of types and in quantities that are not consistent with any purpose not prohibited under the Chemical Weapons Convention; or
- (III) munitions and devices specifically designed or knowing that they are intended to use toxic chemicals or precursors for or as a weapon; or

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<sup>6</sup> This provision needs to be reviewed to determine whether and what items would be so dangerous and of such a nature that they could only be intended for hostile purposes.

- (ii) **[TRANSPORTER NEEDS TO KNOW THAT HE IS TRANSPORTING A NUCLEAR WEAPON OR NUCLEAR EXPLOSIVE DEVICE]** any nuclear weapon or other nuclear explosive device knowing it to be a nuclear weapon or nuclear explosive device[, unless being transported by or on behalf of a nuclear-weapon State Party to the Treaty on Non-Proliferation of Nuclear Weapons, done 1 July 1968, at Washington, London and Moscow (“NPT”) to the same State Party]; or
- (iii) any shipment consisting of:
  - (I) source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, or
  - (II) [dual-use equipment, materials or software,]  
  
knowing that material or equipment described in subclause (I) [or dual-use equipment, materials or software described in subclause (II)] is being transferred, directly or indirectly, [to a state other than a nuclear-weapon State Party to the NPT or to any individual or entity not acting on behalf of a nuclear-weapon State Party to the NPT], for use in, research on, or development, production, maintenance or use of, nuclear weapons or other nuclear explosive devices; or
- (iv)(I) biological agents or toxins knowing that they are intended for use as a weapon or for the production of a weapon or are of types or in quantities that cannot be justified for prophylactic, protective or other peaceful purposes; or
- (II) weapons, equipment or means of delivery designed or knowing that they are intended to use biological agents or toxins for hostile purposes or a purpose that cannot be justified for prophylactic, protective or other peaceful purpose.]

**ALTERNATIVE TWO**  
**COMBINED OFFENCES FOR TRANSPORTING WMD**  
**AND NON-PROLIFERATION OFFENCE**

(c) [transports on board a ship:<sup>7</sup>

- (i) **[TRANSPORTER NEEDS TO KNOW THAT HE HAS A PROHIBITED ITEM (I.E., ONE OF THE LISTED WMD SUBSTANCES) AND THAT IT WILL BE USED FOR A TERRORIST ACT]** any explosive, biological agent or toxin, toxic chemical, or radioactive material, or devices specifically designed to deliver such substances, with the intention that the substance should be used, or in the knowledge that the substance is to be used in order to carry out
  - (I) an act which constitutes an offence under Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, signed at Rome, 10 March 1988,
  - (II) an act which constitutes an offence set forth in any treaty listed in the annex, or<sup>8</sup>
  - (III) any other act intended to cause, where the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act,
    - (1) death or serious bodily injury [to a civilian, or to any other person not taking part in the hostilities in a situation of armed conflict],
    - (2) [extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system [(unless such destruction is caused as a result of the hostilities in a situation of armed conflict)], where such destruction results in or is likely to result in major economic loss, or
    - (3) [serious/extensive/ substantial damage to the environment] [substantial damage to quality of air, soil, water, animals or plants], [unless such damage is caused as a result of the hostilities in a situation of armed conflict]]]<sup>9</sup>; or

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<sup>7</sup> This provision includes both instances where the transporter intends to commit the terrorist act and where the transporter knows of the intent to commit the terrorist act.

<sup>8</sup> Subclauses I and II were added to the Alternative One offence for transporting WMD.

<sup>9</sup> The armed conflict exceptions in clauses (1), (2) and (3) were included based on similar language in the Terrorist Financing Convention; however, it is unclear whether they are needed because of the armed conflict exception in 2 bis(2).

- (ii) **[TRANSPORTER NEEDS TO KNOW THAT HE HAS THE PROHIBITED ITEM (I.E., THE NON-PROLIFERATION SUBSTANCES SET FORTH IN THE RELEVANT NON-PROLIFERATION TREATIES OR ARRANGEMENTS) AND THAT WILL BE TRANSPORTED TO A TERRORIST]**

[any

- (I) biological agent or toxin,
- (II) toxic chemical or its precursors,
- (III) source material, special fissionable material or material especially designed or prepared for the processing, use, or production of special fissionable material,
- (IV) device specifically designed to deliver or to use for a hostile purpose any substance specified in subclauses (c)(ii) (I), (II), or (III), or
- (V) [any dual-use equipment, materials or software for use in research on, or development, production, maintenance or use of, nuclear weapons or other nuclear explosive devices,]

knowing that such substance is intended for a person, group, or organization that conducts or intends to conduct any offense specified in subclauses (c)(i)(I), (II), or (III); ]

- (iii) **[TRANSPORTER NEEDS TO KNOW THAT HE IS TRANSPORTING A NUCLEAR WEAPON OR EXPLOSIVE DEVICE]** any nuclear weapon or other nuclear explosive device knowing it to be a nuclear weapon or nuclear explosive device[, unless being transported by or on behalf of a nuclear-weapon State Party to the Treaty on Non-Proliferation of Nuclear Weapons, done 1 July 1968, at Washington, London and Moscow (“NPT”) to the same State Party]; or

- (iv) **[TRANSPORTER NEEDS TO KNOW THAT HE IS TRANSPORTING A SCHEDULE 1 ITEM]** [any toxic chemical or precursor listed in Schedule 1 of Annex 1 of the Convention on the Prohibition of the Development, Stockpiling and Use of Chemical Weapons and on their Destruction, done 13 January 1993 at \_\_\_\_\_, knowing it to be a toxic chemical or precursor listed on Schedule 1 [and to be transferred to a non-State actor or a State not a party to such convention].]<sup>10</sup>

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<sup>10</sup> This provision needs to be reviewed to determine whether and what items would be so dangerous and of such a nature that they could only be intended for hostile purposes.  
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2. On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the Annex may declare that, in the application of this Protocol to the State Party, the treaty shall be deemed not to be included in paragraph 1, subparagraph (b) [or subparagraph (c)].<sup>11</sup> The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the Secretariat of this fact.<sup>12</sup>
3. When a State Party ceases to be a party to a treaty listed in the Annex, it may make a declaration as provided for in this Article, with respect to that treaty.

### ARTICLE 3 *ter*

Any person also commits an offence if that person:

1. injures or kills any person in connection with the commission of any of the offences set forth in subparagraph (a)(i) or (ii) of paragraph 1 of Article 3 *bis*; <sup>13</sup>
2. attempts to commit an offence set forth in paragraph 1 of Article 3, subparagraph (a)(i) or (ii) of paragraph 1 of Article 3 *bis*, or paragraph 1 of this Article; or
3. participates as an accomplice in an offence set forth in paragraph 1 of Article 3, paragraph 1 of Article 3 *bis* or paragraph 1 or 2 of this Article; or
4. organizes or directs others to commit an offence as set forth in paragraph 1 of Article 3, paragraph 1 of Article 3 *bis* or paragraph 1 or 2 of this Article; or
5. contributes to the commission of one or more offences as set forth in paragraph 1 of Article 3, paragraph 1 of Article 3 *bis* or paragraph 1 or 2 of this Article by a group of persons acting with a common purpose, intentionally and either:
  - (a) with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of Article 3 or paragraph 1 of Article 3 *bis*; or
  - (b) in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of Article 3 or paragraph 1 of Article 3 *bis*.

### PREAMBLE

Insert the following two new "whereas clauses" before the clause beginning with "CONSIDERING":

"RECALLING ALSO that the International Convention for the Suppression of Terrorist Bombings has defined the terms "place of public use," "State or government facility," "infrastructure facility," and "public transportation system" and that the Convention on the

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<sup>11</sup> Subparagraph (c) is added if Alternative 2 is adopted.

<sup>12</sup> Paragraph 2 and paragraph 3 may be moved to the final clauses of the protocol.

<sup>13</sup> If paragraph 1 is accepted, it may be appropriate to combine current paragraph 1(g) of Article 3 with it.

Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done 13 January 1993 at \_\_\_\_\_, has defined the terms "toxic chemicals," "precursor," and "purposes not prohibited under this [that] Convention," and that the International Atomic Energy Agency Statute, done at \_\_\_\_\_ on \_\_\_\_\_, has defined the terms "source material" and "special fissionable material,"".<sup>14</sup>

"HAVING the intention that this Protocol be implemented in a manner consistent with the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July 1968, that the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done 13 January 1993 on \_\_\_\_\_ and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, done at Washington, London and Moscow on 10 April 1972,"

## **II. INFORMAL WORKING GROUP'S DRAFT REVISIONS TO PROPOSED ARTICLE 8 *BIS* BASED UPON COMMENTS RECEIVED FROM LEGAL COMMITTEE MEMBERS**

1. The States Parties shall cooperate to the fullest extent possible to prevent and suppress unlawful acts [against the safety of maritime navigation] **OR** [covered by this Convention], in conformity with [the international law of the sea] **OR** [international law].
2. A State Party that has [reasonable grounds to suspect] **OR** [reasonable grounds to believe] **OR** [clear<sup>15</sup> grounds to believe] that a ship [having its nationality] **OR** [flying its flag] **OR** [claiming the right to fly its flag], the ship's cargo or a person on board the ship is, has been or is about to be involved in, or the target of, the commission of an offence under Article 3, Article 3 *bis* or Article 3 *ter* may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall respond expeditiously to the request and render such assistance within the means available to them.
- 3<sup>16</sup>. Except where a State Party ("the first Party") has notified the Secretary-General that it will apply the provisions of paragraph 4 of this Article, whenever law enforcement or other authorized officials of another State Party ("the requesting Party") encounter a ship:

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<sup>14</sup> Other terms used in the Protocol to the SUA that have definitions in other existing international conventions/agreements could also be appropriately referenced in this proposed whereas clause. The delegation from Denmark noted that it may be necessary to include the definitions themselves. The delegation from Australia noted that this provision may not be necessary if we include the second proposed whereas clause.

<sup>15</sup> One participant suggested using "strong" in place of "clear."

<sup>16</sup> General comments received include: the order of subparagraphs within this paragraph do not reflect the chronology of the decision process contemplated under this paragraph; boardings are the exception to the general rule of exclusive flag State jurisdiction and should be limited to urgent situations; prefer to restrict the scope of paragraph 3 to preventing terrorist acts rather than suppressing such acts; need to link these procedures with the ISPS Code; consider insertion of text that mandates the delivery of underlying justification for the request; eliminate the inconsistency throughout 8 *bis* between use of the terms "Party" and "State."

- (a) [claiming the nationality] **OR** [flying the flag] **OR** [claiming the right to fly the flag], of the first Party, located seaward of any State's territorial sea, and
- (b) the requesting Party has reasonable grounds to suspect that the ship, the ship's cargo or a person on board the ship is, has been, or is about to be involved in, [or the target of<sup>17</sup>], the commission of an offence under Article 3, Article 3 *bis* or Article 3 *ter*, and
- (c) the requesting Party desires to board, it shall [request] **OR** [ask] that the first Party confirm the claim of nationality and if such claim is confirmed, authorize<sup>18</sup> the [law enforcement or other authorized officials of the requesting Party] **OR** [requesting Party] to take appropriate measures with regard to that ship;

the flag State may authorize the [requesting State's law enforcement or other authorized officials] **OR** [requesting State], *inter alia*, to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether the ship or a person or persons on board that ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3 *bis* or Article 3 *ter*.

A State Party shall respond expeditiously to a request from another State Party to determine whether a ship claiming its nationality is entitled to do so and to a request for authorization to take appropriate measures with regard to that ship.

[If the first Party is unable to confirm nationality, [but reasonably believes that the vessel is of their nationality<sup>19</sup>], that Party may [authorize or<sup>20</sup>] indicate that it does not object to the boarding and search by the law enforcement or other officials of the requesting Party, or refute the claim of nationality.<sup>21</sup>]

[If there is no response<sup>22</sup> from the first Party within four (4) hours of a request to confirm nationality, the requesting Party may board and search the suspect ship, its cargo and persons on board, and question the persons found on board in order to locate and examine documentation of its nationality and determine if conduct described in Article 3, Article 3 *bis* or Article 3 *ter* is, has been or is about to take place aboard that ship.<sup>23</sup>]

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<sup>17</sup> Several participants recommended this text be deleted.

<sup>18</sup> One participant requested clarification regarding who would authorize the action indicated.

<sup>19</sup> One participant recommended insertion of this text.

<sup>20</sup> Several participants suggested this text be deleted.

<sup>21</sup> Several participants suggest that this paragraph be deleted.

<sup>22</sup> Several participants asked for clarification as to what is considered to be a response, and when the time period begins, for the purposes of this paragraph; some participants suggested "acknowledgment" in place of "response."

<sup>23</sup> Numerous participants expressed clear opposition to the "silent consent" provision of this paragraph. While there was general agreement that some time limit ought to be applied, there was no consensus as to what that time period should be; consideration of the CWC time limit provisions was suggested. Several participants suggested insertion of an opt-out/opt-in alternative boarding regime patterned on the Aruba Agreement.

4. On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party (“the first Party”) may notify the Secretary-General that whenever law enforcement or other authorized officials of another State Party (“the requesting Party”) encounter a ship
  - (a) [claiming the nationality] **OR** [flying the flag] **OR** [claiming the right to fly the flag], of the first Party, located seaward of any State’s territorial sea, and
  - (b) the requesting Party has [reasonable grounds to suspect] **OR** [reasonable grounds to believe] **OR** [clear<sup>24</sup> grounds to believe] that the ship, the ship’s cargo or a person on board the ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3 *bis* or Article 3 *ter*,

the requesting State’s law enforcement or other authorized officials are authorized to board and search such ship, its cargo and persons on board, and to question the persons on board in order to determine whether the ship or a person or persons on board that ship is, has been or is about to be involved in the commission of an offence under Article 3, Article 3 *bis* or Article 3 *ter*.

The notification can be withdrawn at any time.

- 5<sup>25</sup>. When evidence of conduct described in Article 3, Article 3 *bis* or Article 3 *ter* is found as the result of any boarding conducted pursuant to this Article, the flag State may authorize the law enforcement or other authorized officials of the requesting Party to detain the ship, cargo and persons on board pending receipt of expeditious disposition instructions from the first Party<sup>26</sup>.
6. A flag State, consistent with the other provisions of this Convention, may subject its authorization [provided pursuant to Paragraphs 3 and 5<sup>27</sup>] to conditions to be agreed by it and the requesting State, including conditions relating to responsibility for and the extent of effective measures to be taken. No additional measures [would] **OR** [may] be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multilateral agreements.
- 7<sup>28</sup>. The boarding and search of a suspect ship pursuant to this Article shall be conducted in accordance with [the obligations assumed by the requesting Party under international law, including the safeguards provisions of this Article] **OR** [the safeguards provisions of this Article and applicable international law]. [The authorization to board, search and detain includes the authority to use reasonable force<sup>29</sup>.]

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<sup>24</sup> One participant suggested using “strong” in place of “clear.”

<sup>25</sup> One participant suggested we consider insertion of text that would address actions to take in the event non-SUA illegal activity is discovered. One participant suggested insertion of text that contains more specific disposition instructions.

<sup>26</sup> A participant suggested that we eliminate the inconsistency between use of the terms “Party” and “State.”

<sup>27</sup> Several participants suggested insertion of text that provides an explicit link to these paragraphs.

<sup>28</sup> One participant recommends insertion of text that takes into account the security regime of the ISPS Code.

<sup>29</sup> Several participants suggest this sentence be deleted. One participant suggested that if this sentence is retained, it be drafted to be consistent with the last sentence of subparagraph (a).

- (a) Subject to the provisions of subparagraph (b) below, [States Parties] **OR** [law enforcement officials] shall avoid the use of force except when and to the degree necessary to ensure the safety of the [boarding] **OR** [those] officials<sup>30</sup> and where the officials are obstructed in the execution of their duties. All uses of force by [a State Party] **OR** [law enforcement officials] pursuant to this Article shall in all cases be [the minimum reasonably necessary] **OR** [the minimum necessary] **OR** [that which is reasonably necessary<sup>31</sup>] under the circumstances<sup>32</sup>.
  - (b) Nothing in this Convention, as amended, shall impair the exercise of the inherent right of self-defense by the States Parties or their law enforcement or other authorized officials<sup>33</sup>.
8. The requesting Party shall promptly inform the first Party of the results of a [boarding and search] **OR** [boarding, search, and detention] conducted pursuant to this Article.
- [9. Safeguards:

- (a) Where a State Party takes measures against a ship in accordance with this Article, it shall<sup>34</sup>:
  - (i) take due account of the need not to endanger the safety of life at sea;
  - (ii) ensure that all persons<sup>35</sup> on board are treated in a manner which preserves their basic human dignity during the conduct of boardings<sup>36</sup>, and in compliance with the applicable provisions of international law, including international law of human rights;
  - (iii) take due account of the security of the ship and its cargo;
  - (iv) not prejudice the commercial or legal interests of the flag State;
  - (v) ensure, within available means, that any measure taken with regard to the ship is environmentally sound under the circumstances;

<sup>30</sup> One participant suggested text be inserted that would extend protection to officials who remain on the boarding vessel during the boarding.

<sup>31</sup> One participant recommended using “no more than absolutely necessary.”

<sup>32</sup> One participant suggested that this subparagraph be moved into the safeguards provisions in 9(a).

<sup>33</sup> Numerous participants expressed a clear desire to delete this subparagraph entirely as being unnecessary in view of paragraph 7(a) and Article 51 of the UN Charter. If it is to be retained at all, the text should distinguish between national and individual self-defense. One option that would accomplish this is to delete the words “by the States Parties or their.”

<sup>34</sup> Several participants prefer using the safeguards provisions contained in the Migrant Smuggling Protocol. One participant requests that text be added that considers recent IMO guidance to ship crews on piracy, the ISPS Code, and MSC Circ. 623/rev 3 of 29 May 02 on piracy. One participant expressed concern that additional practical operational considerations were raised by 8 *bis*, and ought to be addressed.

<sup>35</sup> One participant suggested that these protections be explicitly extended to passengers and stowaways on board the boarded vessel.

<sup>36</sup> One participant suggested insertion of language that would further describe the duration of these protections.

- (vi) ensure that persons on board against whom proceedings are being carried out in connection with any of the offences set forth in Article 3, Article 3 *bis*, or Article 3 *ter* are afforded the protections of Article 10(2)<sup>37</sup>; and
  - (vii) ensure that the master of a vessel is, or has been, afforded the opportunity to contact the vessel's owner or [flag State] **OR** [a representative of the flag State] at the earliest opportunity<sup>38</sup>.
- (b) Reasonable efforts shall be taken to avoid a ship being unduly detained or delayed. Where the grounds for measures taken pursuant to this Article prove to be unfounded, States Parties shall be liable for damage or loss attributable to them, [consistent with their national laws<sup>39</sup>] **OR** [consistent with international law] **OR** [deleted<sup>40</sup>], arising from action taken pursuant to this Article when such action is unlawful or exceeds that reasonably required in light of available information to implement the provisions of this Article, provided that the vessel has not committed any act justifying the measures taken<sup>41</sup>.
- (c) Any measure taken, adopted or implemented in accordance with this Convention shall take due account of the need not to interfere with or to affect:
- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
  - (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.
- (d) Any measure taken at sea pursuant to this Article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding Articles 2 and 2 *bis*, the provisions of this Article shall apply.

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<sup>37</sup> One participant noted that by its terms, Article 10(2) may not apply on the high seas, and as such should be clarified.

<sup>38</sup> One participant recommended insertion of text that will better define the term "at the earliest opportunity." That participant also suggested that text providing for prior notification be added.

<sup>39</sup> One participant objected to this choice in that it might create a loophole for public vessels.

<sup>40</sup> One participant suggested insertion of the term "applicable law;" many delegations recommended deletion of reference to any law.

<sup>41</sup> Many participants suggested that this text be shortened and clarified; reliance on Articles 232, 106, and 110 of UNCLOS were offered as potential sources for this rewrite, as well as the explicit text of the Straddling Stocks Convention. Some participants recommended deletion of "provided that the vessel has not committed any act justifying the measures taken." One delegation noted that this subparagraph did not adequately provide for compensation in the event of damage when the grounds for boarding proved to be unfounded.

- (e) For the purposes of this Article “law enforcement or other authorized officials” means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities that are notified to the Secretary-General by the State Party responsible for those authorities as being authorized to act pursuant to this Article.<sup>42]</sup>
- [10. This Article does not apply to or limit boarding of ships, conducted by any State Party in accordance with international law, seaward of any State’s territorial sea, including boardings based upon, *inter alia*, the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.<sup>43]</sup>
11. The States Parties [are encouraged to] **OR** [shall] develop standard operating procedures for joint operations pursuant to this Article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.
12. In order to meet the objectives of this Article, each State Party [is encouraged to] **OR** [shall] co-operate closely with the other States Parties<sup>44</sup>. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this Article.
13. Consistent with [international law] **OR** [its legal system] **OR** [basic principles of its legal system], each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to exercise the authority of law enforcement or other authorized officials as prescribed in this [Convention, as amended] **OR** [Article]<sup>45</sup>.
- [14. For the purposes of this Convention, a claim of nationality may be made, *inter alia*, by the flying of a flag or displaying marks of registration. In the absence of a flag or marks of registration, a responsible official on the ship shall be requested to state the nationality of the ship.<sup>46]</sup>
15. On or after it deposits its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities, to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation shall be notified to the Secretary-General within one month [of becoming a Party<sup>47]</sup>,

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<sup>42</sup> One participant recommended deletion of this subparagraph in its entirety.

<sup>43</sup> Several participants suggested that this paragraph could be deleted as being unnecessary in light of existing Article 9 of the SUA.

<sup>44</sup> One participant suggested this sentence be deleted as it provides for a lower standard of cooperation that is mandated in paragraph 1 of this Article.

<sup>45</sup> Several participants suggested language be added to this paragraph that would provide an explicit link to paragraph 12. One participant noted that this paragraph could be interpreted to mean that it requires the empowerment of law enforcement officials in every case. One participant requested clarification as to whether the measures taken under 8 *bis* were limited to those outside the territorial sea.

<sup>46</sup> Several participants noted that while this draft was an improvement, they requested the brackets be retained.

<sup>47</sup> Inserted to specify the time period for meeting the requirement to file designation of authority.

who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information<sup>48</sup>.

16. A State Party that has reasonable grounds to suspect that a ship, its cargo or a person on board the ship is, has been, or is about to be involved in, or the target of, the commission of an offence under Article 3, Article 3 *bis* or Article 3 *ter*, and that the ship is without nationality, or may be assimilated to a ship without nationality, may board and search the ship to verify the ship's lack of nationality. If evidence confirming either suspicion is found, that State Party [shall] **OR** [may] take appropriate measures in accordance with international law<sup>49</sup>.

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<sup>48</sup> Several participants recommended this provision be examined for consistency with the ISPS Code and SOLAS provisions dealing with designation of officials. Several participants recommend text be added that will require the Secretary General to distribute updated contact information.

<sup>49</sup> Many participants suggested that this paragraph be deleted in its entirety. If it is retained, several delegations suggest that the last sentence be revised to clarify what "either suspicion" refers to.



## ANNEX 4

**REVIEW OF THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS  
AGAINST THE SAFETY OF MARITIME NAVIGATION, 1988, AND ITS PROTOCOL  
OF 1988 RELATING TO FIXED PLATFORMS LOCATED ON THE CONTINENTAL  
SHELF (SUA CONVENTION AND PROTOCOL)**

**Revised Terms of reference for the Correspondence Group regarding  
the 1988 SUA Convention and the 1988 SUA Protocol**

**Approved by the Committee**

1 The SUA Correspondence Group, taking into account the discussions, comments and the progress made during the consideration of the issue at the eighty-seventh session of the Legal Committee (LEG 87/17, paragraphs 88 to 142), shall continue the work on the development of appropriate amendments to the 1988 SUA Convention and the 1988 SUA Protocol so as to enable the Committee to propose, as soon as possible, necessary amendments for the two instruments in order to facilitate, strengthen and expand international co-operation and co-ordination as a means of combating unlawful acts, including terrorist acts.

2 In preparing any draft amendments to the 1988 SUA Convention and the 1988 SUA Protocol, the SUA Correspondence Group shall, *inter alia*;

- (a) continue to take into consideration other conventions and protocols relating to terrorism as well as other relevant instruments containing provisions similar to those proposed for inclusion (e.g. the boarding provisions) with the intent to avoid duplication or conflict;
- (b) continue the revision and refinement and the exploration of the expansion, as necessary, of the offences in article 3 of the 1988 SUA Convention and article 2 of the 1988 SUA Protocol to ensure that a wide range of unlawful acts, including terrorist acts, are sufficiently covered by these two instruments in light of the experience of 11 September 2001; and
- (c) address, as a priority, the revision of the offence provisions and the further development of the provisions relating to boarding.

3 The SUA Correspondence Group shall report to the Legal Committee at its next session, LEG 88, for the purpose of enabling the Committee to further consider the matter and to review its recommendation to the Assembly, through the Council, on the convening of a diplomatic conference to adopt the proposed amendments during the 2004-2005 biennium.

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## ANNEX 5

**RECOMMENDED APPENDIX 1 TO THE ANNEX TO THE DRAFT ASSEMBLY  
RESOLUTION ON GUIDELINES ON PLACES OF REFUGE (LEG 87/7, ANNEX)**

At the international level, *inter alia* the following Conventions and Protocols are in force and constitute *inter alia* the legal context within which coastal States and ships act in the envisaged circumstances<sup>1</sup>:

- United Nations Convention on the Law of the Sea (UNCLOS), in particular article 221 thereof;<sup>2</sup>
- International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the Intervention Convention), 1969, as amended;
- Protocol relating to Intervention on the High Seas in Cases of Pollution by substances other than Oil, 1973;
- International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974), as amended, in particular chapter V thereof;
- International Convention on Salvage, 1989 (the Salvage Convention);<sup>3</sup>
- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (the OPRC Convention);
- International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
- International Convention on Maritime Search and Rescue, 1979 (SAR 79), as amended;

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<sup>1</sup> It is noted that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance.

<sup>2</sup> “1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, “maritime casualty” means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.”

<sup>3</sup> Parties to the International Convention on Salvage, 1989 (Salvage 1989), are obliged under article 11 of the Convention when considering a request for a place of refuge, to take into account the need for co-operation between salvors, other interested parties and public authorities to ensure the efficient and successful performance of salvage operations. Article 11 of the Salvage Convention states:

“A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;
- Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971;
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969;
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992;
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992; and
- Convention on Limitation of Liability for Maritime Claims (LLMC), 1976.

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## ANNEX 6

### LONG-TERM WORK PLAN OF THE LEGAL COMMITTEE FOR THE PERIOD UP TO 2010

The following is an indicative list of subjects for consideration by the Legal Committee for the period to 2010. This list is not exhaustive and the subjects are not listed in order of priority.

#### **I Specific subjects**

- 1 Completion of preparatory work on a convention on wreck removal;
  - The Committee is working towards the objective of having a draft convention on wreck removal ready for consideration by a Diplomatic Conference in the biennium 2004-2005.
- 2 Monitoring the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers;
  - The Committee approved two questionnaires, prepared by a Joint IMO/ILO Working Group, intended to assess the implementation of resolutions A.930(22) and A.931(22). The Committee also approved a third questionnaire on reporting incidents of abandonment and revised terms of reference for the Joint Working Group.
- 3 Revision of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, 1988 (SUA Convention and the SUA Protocol);
  - The Committee is working towards the objective of having draft protocols to the SUA Convention and the SUA Protocol ready for consideration by a Diplomatic Conference in the biennium 2004-2005.
- 4 Follow-up action regarding the question of places of refuge;
  - The Committee considered the international law implications of the draft guidelines on places of refuge developed by MSC and NAV and provided advice in this regard.
  - The Committee also considered the results of a survey conducted at its request by the CMI on the extent to which domestic law deals with the subject. The Committee requested the Secretariat, in conjunction with the CMI, to review international and national law dealing with liability and compensation in relation to places of refuge. In light of the results of the survey, the Committee will take appropriate action.

- 5 Possible comprehensive revision of the Civil Liability and Fund Conventions on liability and compensation for oil pollution damage; and
  - During the biennium 2002-2003, the Committee approved a draft protocol to the Fund Convention to establish a third tier of compensation. The Protocol was adopted by a Diplomatic Conference held in May 2003.
- 6 Monitoring the implementation of the HNS Convention;
  - The Committee finalized analytical materials prepared by a Correspondence Group to promote the ratification and implementation of the HNS Convention and requested that they be posted on the IMO website.

## **II General subjects**

- 1 Possible revision of maritime law conventions in the light of proven need and subject to the directives in resolution A.500(XII), resolution A.777(18) and resolution A.900(21);
  - This is a generic item which allows for revision of any of the maritime law conventions subject to the Committee's purview, as and when the need for revision arises.
  - The Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 was adopted by a Diplomatic Conference held in October 2002. This Protocol was based on the text developed by the Committee.
  - The Protocol of 2003 to the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 was adopted by a Diplomatic Conference held in October 2002. Among the resolutions adopted by that Conference was one concerning a review of the international compensation regime for oil pollution damage, in connection with a possible comprehensive revision of the Civil Liability and Fund Conventions, being undertaken by the 1992 Fund Assembly. The resolution called on the Organization to consider the outcome of this review and take action as appropriate.
  - The Committee also engaged in a revision of the SUA Convention and the SUA Protocol; see details above at paragraph I(3).
- 2 Monitoring the implementation of conventions adopted as a result of the work of the Legal Committee;
  - This is a generic item which allows the Committee to monitor implementation of the conventions subject to the Committee's purview with the aim of providing guidance when it may be needed.

- The Committee has been monitoring the implementation of the HNS Convention; see details above at paragraph I(6).
- 3 Examination of issues relating to the role of the Organization under the United Nations Law of the Sea Convention;
- The Committee discussed certain provisions of UNCLOS in the course of its deliberations concerning the draft Wreck Removal Convention as well as those concerning places of refuge and the SUA Convention and the SUA Protocol.
- 4 Promotion of IMO's technical co-operation sub-programme in the field of maritime legislation;
- This is a continuing item on the Legal Committee's work programme.
  - During the biennium 2002-2003, the Committee has discussed activities taking place in area of technical co-operation in the field of maritime legislation particularly insofar as these activities pertain to legal issues.
- 5 Legal issues arising in other IMO bodies and referred to the Legal Committee;
- This is a generic item to allow the Committee to address issues which may be referred to it by other IMO bodies.
  - During the biennium 2002-2003, the Committee has reviewed draft guidance on places of refuge, at the request of the Maritime Safety Committee and NAV and recommended a list of international instruments to be included in the Guidelines. The Committee has also discussed and advised on several issues referred to it from other IMO bodies, including treatment of persons rescued at sea referred to it by NAV and definitions of terms "ownership" and "control of ships" referred to it by the Intersessional Working Group on Maritime Security. The Committee expressed its willingness to examine particular issues as may be requested by other IMO bodies.
- 6 Co-ordination and co-operation with the UN and specialized agencies in legal matters of common interest; and
- The Committee established and is monitoring the work of a Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers. The Group held its fourth session during the biennium.
- 7 Examination of maritime law initiatives undertaken by Member States or non-governmental bodies.
- The Committee requested the CMI, in conjunction with the IMO Secretariat, to develop a questionnaire to gather information about existing

national laws concerning measures to protect crew and passengers against crimes on vessels. Once this information is available the Committee will take such action as it deems appropriate. The questionnaire was distributed to Member States by the Secretariat.

- The Committee considered the results of a survey conducted by the CMI to ascertain the extent to which domestic law dealt with the question of vessels in distress seeking refuge. The Committee also requested the CMI, in conjunction with the IMO Secretariat, to develop a questionnaire to assess international and national laws covering liability and compensation in relation to places of refuge. The questionnaire was distributed to Member States by the Secretariat.

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## ANNEX 7

**WEST EUROPEAN PARTICULARLY SENSITIVE SEA AREA (PSSA)****Comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALOS) in connection with issues raised in document LEG 87/16/1****Background**

Comments on law of the sea issues raised in document LEG 87/16/1 from DOALOS are reproduced in the following paragraphs.

**Summary**

DOALOS does not believe that the WE PSSA is contrary to article 211(6) of UNCLOS. The area lies within the 200 mile limits of the States concerned and is clearly defined by geographical co-ordinates. The information provided demonstrates that the area meets the criteria for vulnerability set out in 211(a). The requested associated protective measure (APM) of 48 hour advance notification of entry by vessels carrying heavy grades of oil would not *per se* hinder navigation, but merely alert the relevant coastal States to the arrival of a vessel carrying cargo that could cause serious pollution in the event of an accident.

**Consistency of PSSA Guidelines with UNCLOS**

Although the PSSA guidelines derive from the provisions of UNCLOS 211(6), they are far more detailed and “liberal” in their approach, as befits a more sophisticated and comprehensive scientific understanding of the dangers posed by ships to the marine environment, as well as the broader range of protective measures available within the competence of IMO since the negotiation of UNCLOS in the 1970s. The legality of the PSSA Guidelines themselves is not in question, as they fall within the competence of IMO to regulate international shipping activities and their possible consequences for the marine environment. Moreover, the Guidelines conform to the requirements of article 237, as a subsequent agreement adopted by IMO Assembly in furtherance of the general principles set forth in the Convention, in particular, those in part XII.

**The WE PSSA and the Specific Requirements of Article 211(6)**

Article 211(6) provides for the adoption of special mandatory measures for the prevention of pollution from vessels in special areas and special circumstances where coastal States have reasonable grounds to believe that general applicable international rules and standards are inadequate to protect the area in question.

It is clear from the WE proposal that the sponsoring States consider that the existing rules and standards are inadequate to protect the area in question from pollution caused by incidents involving discharges or the probability of discharges of heavy oil.

Article 211(6) requires that all the following criteria be met to qualify an area as requiring protection: 1) particular oceanographical and ecological conditions, 2) the need to protect or utilize the resources in the area, and 3) the particular character of the maritime traffic. The submission for the WE PSSA provides considerable detailed scientific information on the

oceanographical and ecological conditions of the area, as well as on the natural resources that need protection. Furthermore, it provides evidence that the maritime traffic in the area is extremely dense, that many vessels carry heavy oil and that there have been a large number of accidents with serious adverse consequences for the environment, including the **Aegean Sea**, the **Erika** and the **Prestige**.

As to the size of the area, article 211(6) only requires that it be “a particular, clearly defined area of their respective exclusive economic zones”. While it appears from this phrase that the area should in principle not include the entire exclusive economic zones, there is no maximum restriction on size. In fact, if the entire EEZ were proven to be particularly sensitive and vulnerable to maritime traffic, it could be argued that it should be protected. However, in the instant case, it does not appear that the entire EEZs of all the States in question are included.<sup>1</sup> Furthermore, as was stated during the debate at MEPC, the PSSA of the Great Barrier Reef is equivalent in size. Finally, while it is true that the WE PSSA covers a number of diverse eco-systems, there is no requirement in article 211(6) that the area concerned cover only one ecosystem. Several might be included, provided that they are all vulnerable to pollution from maritime traffic.

### **Proposed Protective Measure**

Article 211 does not prohibit the use of notification requirements. The type of protective measures to be applied are left to be determined by the competent international organization - IMO - within the general categories of rules, standards, and navigational practices designed to prevent pollution. In fact, measures adopted by IMO under SOLAS include ship reporting systems in chapter V (Navigation), regulation 11. Through the adoption of this regulation, States have already agreed implicitly that notification of entry into an area would not impede freedom of navigation. Furthermore, one of the primary purposes of ships’ reporting systems is to enable coastal States to be prepared for any possible pollution incidents. It should be noted that a ship reporting system has already been adopted in connection with the PSSA for the Great Barrier Reef.

On the other hand, there is no provision in SOLAS for the 48 hour prior notification. Normally, ships report upon entry into the area covered by the system. We understand that concerns have been expressed that the notification might be used to trigger further measures that might be contrary to UNCLOS. For example, if the 48 hour notification requirement were used as a basis for prohibiting entry into the WE PSSA, then the prohibition would violate the principle of freedom of navigation. However, such a measure is not proposed in the six State application to IMO. Finally, if NAV approves the measure as being in conformity with IMO requirements, then it would also be in conformity with UNCLOS, as UNCLOS defers to IMO on navigational rules, regulations and standards, and paragraph 8 of regulation 11 of SOLAS provides that:

“All adopted ship reporting systems and actions taken to enforce compliance with those systems shall be consistent with international law, including the relevant provisions of the United Nations Convention on the Law of the Sea.”

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<sup>1</sup> The UK and Ireland have not declared EEZs.  
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## **Conclusion**

For all the above reasons, we conclude that the six-state application to IMO for a WE PSSA, as modified by the decision to delete the proposal regarding double hulled tankers, and the slight change in boundary to accommodate the concern of Norway, does not violate the provisions of UNCLOS.

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